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1 G. PATRICK GALLOWAY, ESQ. (State Bar No. 49442)
 2 KAREN A. SPARKS, ESQ. (State Bar No. 137715)
 3 GALLOWAY, LUCCHESI, EVERSON & PICCHI
 A Professional Corporation
 4 2300 Contra Costa Blvd., Suite 350
 Pleasant Hill, CA 94523-2398
 5 Tel. No. (925) 930-9090
 Fax No. (925) 930-9035
 E-mail: ksparks@glattys.com

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ALAMEDA COUNTY

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6 Attorneys for Defendant
7 UCSF BENIOFF CHILDREN'S HOSPITAL OAKLAND

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF ALAMEDA - NORTHERN DIVISION

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

Case No. RG15760730

The Honorable Robert B.
Freedman

14 Plaintiffs,

15 vs.

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

REPLY IN SUPPORT OF UCSF BENIOFF
CHILDREN'S HOSPITAL OAKLAND'S
DEMURRER TO FIRST CAUSE OF
ACTION AND MOTIONS TO STRIKE
PORTIONS OF FIRST AMENDED
COMPLAINT; REQUEST FOR JUDICIAL
NOTICE

Date: January 8, 2016
Time: 11:00 a.m.
Dept: 20
Date Complaint Filed:
Trial: N/A

20 Defendants.

Reservation No. R-1686975

24 **REPLY IN SUPPORT OF UCSF BENIOFF CHILDREN'S HOSPITAL OAKLAND'S**
 25 **DEMURRER TO FIRST CAUSE OF ACTION AND MOTIONS TO STRIKE**
 26 **PORTIONS OF FIRST AMENDED COMPLAINT; REQUEST FOR JUDICIAL NOTICE**

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6 Nailah Winkfield v. State of California, Case No. 4:15-cv-06042 – KAW
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8 Schabarum v. California Legislature (1998) 60 Cal.App.4th 1205 2

9 Union Pacific Railroad Company v. Santa Fe Pacific Pipelines, Inc. (2014) 134 4

10 **Statutes**

11 Code of Civil Procedure §1858 2

12 Health and Safety Code §7151.40 1

13 Health and Safety Code §7180 1

14 Uniform Determination of Death Act 1, 2, 4

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16 **Other Authorities**

17 National Conference of Commissioners on Uniform State Law, 12A U.L.A.
18 (Masters Ed., 2008) Determination of Death Act pp. 777-779 1

I.

A DETERMINATION OF DEATH IS INTENDED TO BE FINAL, FIXED AND PERMANENT, AND MUST BE FINAL TO SERVE ITS INTENDED PURPOSE

Health and Safety Code § 7180 governs the determination of death in California and expressly provides that "An individual who has sustained *irreversible* cessation of all functions of the entire brain ... is dead." Statutes must be construed in a manner consistent with the ordinary meaning of the words used, and in a manner that gives effect to their intended purpose. See e.g. Estate of Griswolds v. See (2004) 25 Cal. 4th 904, 910-911. Consistent with its ordinary meaning, death is irreversible and final.

As defendant has previously noted, the determination of death permits medical treatment to be withdrawn (see 1/17/2014 Final Judgment Denying Petition for Medical Treatment, CHO Demurrer Exhibit B), and organs to be removed for transplant (see Health and Safety Code § 7151.40). A declaration of death also permits wills to be probated, insurance proceeds to be distributed, and it permits families to move on. To serve its intended purpose, a determination of death must be final. A provisional determination of death that is not final, fixed and permanent would have no meaning or use.

The Uniform Determination of Death Act was drafted by legal and medical authorities; it reflects accepted biomedical practices, and requires that the determination be made in accordance with accepted medical standards for determining *irreversible* brain death. See UDDA, and National Conference of Commissioners on Uniform State Laws, Prefatory Note ¶ 2, 12A U.L.A. (Masters Ed. 2008), Determination of Death Act pp.777 - 779, CHO Demurrer Exhibit H.

In December, 2013, Dr. Fisher and two other physicians determined that Jahi had suffered irreversible cessation of brain function according to American Academy of Pediatrics' Guidelines. Plaintiffs acknowledged that these Guidelines were the accepted medical standard for determining irreversible brain death in children and stipulated that Dr. Fisher had appropriately conducted the brain death examination according to these

1 standards. 1/2/2014 Amended Order Denying the Petition For Medical Treatment at
2 6:22-7:1, CHO Demurrer Exhibit A. According to the Guidelines, the cessation of brain
3 function was irreversible and permanent as a matter of accepted scientific fact.

4 Plaintiffs do not fault the findings made by Dr. Fisher. Rather they appear to be
5 contending that even with the proper application, the accepted medical standards are
6 unable to determine when the cessation of brain function is irreversible, and/or that
7 brain death itself should not be used as a basis for determining death. For example, one
8 of plaintiffs experts opines that the standard clinical diagnostic criteria are not as
9 absolutely, 100% reliable as commonly believed. Declaration of Alan Shewmon, M.D. at
10 page 3, ¶ 4, CHO Demurrer Exhibit C6; Dr. De Fina states that person pronounced brain
11 dead was later found to have brain activity when more sensitive tests were used.
12 Declaration of Phillip De Fina Ph.D., CHO Demurrer Exhibit C2.

13 But Uniform Determination of Death Act, and all the legislatures of all states that
14 have enacted this statute, recognize the use of the loss of brain function as a means of
15 defining death. And the AAP Guidelines are broadly accepted by the medical
16 community as a means of determining whether a cessation of brain function has
17 occurred and whether it is irreversible. It is not up to this Court or a jury in this action to
18 reject these Guidelines and/or the UDDA based on the testimony of a handful of experts
19 who disagree with the Guidelines. Nor is it up to this Court to reweigh the facts and
20 findings underlying the Uniform Determination of Death Act or to decide whether brain
21 death can or should be used as a basis for determining death. See Schabarum v.
22 California Legislature (1998) 60 Cal.App.4th 1205, 1219; C.C.P. §1858.

23
24 **II.**

25 **THE HOSPITAL DOES NOT RELY ON THE DEATH CERTIFICATE TO ESTABLISH**
26 **THAT JAHİ LACKS STANDING TO ASSERT A PERSONAL INJURY ACTION**

27 In December, 2013, Jahi was determined to be irreversibly brain dead. For all the
28 reasons discussed above and in the Hospital's moving papers, this determination was

1 intended to be a final determination. It was final before a death certificate was issued,
2 and would arguably be final even if no Certificate had been issued.

3 The fact that a Death Certificate was issued does however indicates that a
4 determination of death had been made, and that it was considered final under the law.
5 In its ruling, the Court pointed out that the facts in death certificates are subject to
6 rebuttal and explanation. A subsequent dispute however does not change the fact that,
7 upon issuance, a death certificate indicates that a final determination of death has been
8 made. In addition, plaintiffs have still failed to present authority for disputing the *fact of*
9 *death itself* as opposed to secondary issues such as time, cause, or manner of death.

10 Plaintiffs are now addressing the "Death Certificate" issues in yet another forum.
11 The Hospital asks the Court to take judicial notice of *Nailah Winkfield v. State of*
12 *California*, Case No. 4:15-cv-06042 – KAW filed on December 23, 2015, in the U.S.
13 District Court for the Northern District of California. Federal Complaint, Reply Exhibit A.

14 III.

15 **THE HOSPITAL DOES NOT CONTEND THAT THE OCTOBER 2014**
16 **PROCEEDINGS HAVE PRECLUSIVE EFFECT, BUT COLLATERAL**
ESTOPPEL DOES APPLY TO THE DECEMBER 2013 PROCEEDINGS

17 **A. THERE WAS NO FINAL RESOLUTION OF THE PETITION FOR**
18 **RECONSIDERATION OF THE JANUARY 2014 JUDGMENT BECAUSE**
PLAINTIFF WITHDREW THE PETITION

19 As plaintiffs point out, there was no final determination of plaintiff's October 2014
20 Petition to have Judge Grillo reconsider his January 2014 Judgment. In response to the
21 Petition, Judge Grillo again appointed Dr. Paul Fisher as the Court's expert, despite the
22 objections of plaintiffs. 10/6/2014 Order Appointing Dr. Paul Fisher As Court Expert
23 Witness, CHO Demurrer Exhibit D. Dr. Fisher submitted a letter to the Court responding
24 to the issues raised by plaintiff's experts, disputing their findings and conclusions, and
25 explaining why the facts asserted would not change the determination of death.
26 10/6/2014 Letter Of Paul Fisher, M.D., CHO Demurrer Exhibit E. Plaintiffs moved to
27 continue the hearing on the Petition, but then dropped the matter altogether. 10/8/2014

1 Case Management Order Confirming Petitioner's Withdrawal Of Petition for Writ Of
2 Error Coram Nobis at 3:3-10, 4:21-22, CHO Demurrer Exhibit F.

3 In the October 2014 proceeding, Judge Grillo did note the "changed
4 circumstances" exception to collateral estoppel, but the Petition was withdrawn before
5 this issue could be addressed. The issue was never raised or briefed by the plaintiffs,
6 nor did the defendants have any opportunity to address the issue.

7 **B. THE DETERMINATION OF IRREVERSIBLE CESSATION OF BRAIN
8 FUNCTION UNDER THE MEDICALLY ACCEPTED STANDARD IS BY
9 DEFINITION FIXED AND PERMANENT AND DOES NOT FALL WITHIN
10 THE EXCEPTION TO COLLATERAL ESTOPPEL**

11 Plaintiffs contend that the Court recognized that collateral estoppel does not
12 apply here. But the Court's ruling on the previous demurrer states that "it may or may
13 not be appropriate for the court to make a determination in this regard at the pleading
14 stage," and referring to the record of the December 2013 proceedings, the Court states
15 that it "makes no binding determination as to their preclusive effect."

16 The changed circumstances exception to collateral estoppel applies *only* when
17 the fact or status at issue is *not* fixed and permanent in nature. Union Pacific Railroad
18 Company v. Santa Fe Pacific Pipelines, Inc. (2014) 231 Cal.App.4th 134, 181. The
19 Defense has found no authority applying the exception to a determination of death.

20 For all the reasons discussed above, the determination of death under the UDDA
21 and the accepted medical standards is intended to be final both medically and legally.
22 To hold otherwise, a court would have to reject the broadly accepted medical standards
23 for determining *irreversible* cessation of brain function and/or the UDDA which permits
24 the use of irreversible brain death as a basis for making a final determination of death.
25 The cases cited by plaintiffs in support of applying the changed circumstance exception
26 do not pertain to the determination of death, and they not analogous to that
27 determination and the unique factual and policy issues it raises.

28

1 **C. APPLYING COLLATERAL ESTOPPEL HERE IS NEITHER UNFAIR NOR**
2 **AGAINST SOUND PUBLIC POLICY**

3 Plaintiffs point to a number of factors to be considered in applying the principles
4 of collateral estoppel, but these considerations do not preclude the application of the
5 doctrine here.

6 **1. The Interests At Stake**

7 The interest at stake in the December 2013 was of the highest order: whether
8 Jahi should be continued on life support or whether life support could be withdrawn. No
9 other interest would be more likely to motivate the court and the parties to fully, fairly,
10 and finally determine whether Jahi was dead.

11 However, the life support issue has since been resolved. Jahi is continuing on
12 life support in New Jersey. The issue here is simply the amount of damages plaintiffs
13 will be able to recover. Plaintiffs would also rather live in California than in New Jersey,
14 and apparently do not believe this is possible until Jahi is found "not dead" under
15 California law. See Federal Complaint ¶¶ 230-231, Reply Exhibit A.

16 In opposition, plaintiffs contend "That Jahi should not be precluded from
17 claiming her life goes on" because it is a matter of human rights and legal rights. But
18 this *assumes* that Jahi is alive, and to add some perspective, in reality *Jahi* is not
19 capable of claiming anything. Even if alive, plaintiffs do not present any evidence or
20 even contend that Jahi can in any way comprehend her situation, the meaning of this
21 lawsuit, or the affect it will have on her. The lawsuit is about who will pay for the life
22 support the family wants to continue indefinitely.

23 **2. The Opportunity To Litigate The Death Issue**

24 First, the determination of death is to be made by doctors. As the court in Dority
25 v. Superior Court (1983) 145 Cal. App. 3d 273, 278 recognized, Health and Safety Code
26 § 7180 requires only that the determination be made according to accepted medical
27 standards, and that this is a medical problem not requiring a "rubber stamp" from the
28 courts. Although the court recognized that this process may require intervention by a

1 court in some cases, it was not concerned over the expedited nature of these
2 proceedings. Id. at 275-276.

3 In the present case, the determination of death was made by three physicians,
4 and confirmed by the Court. There is no authority to suggest that plaintiffs in a medical
5 malpractice action are entitled to further litigate these determinations in order to support
6 their case for tort damages.

7 Moreover, the December 2013 proceeding was not informal. Motions and
8 Petitions were filed, opposition briefs were submitted, an independent expert was
9 appointed by the Court, hearings were held, medical records were admitted, the doctors
10 who made the brain death determinations submitted declarations and testified before
11 the Court, the law was analyzed and applied, objections were made and ruled on, and
12 formal orders and a final judgment were issued. 1/2/2014 Amended Order Denying the
13 Petition For Medical Treatment at 2:7-21, CHO Demurrer Exhibit A; 1/17/2014 Final
14 Judgment Denying Petition for Medical Treatment, CHO Demurrer Exhibit B. In addition,
15 plaintiffs withdrew their request to offer the testimony of their expert, Dr. Paul Bryne with
16 the Court noting that it appeared that there was some question as to whether he would
17 qualify given his religious and philosophical approach to the definition of death.
18 11/2/2014 Amended Order Denying the Petition For Medical Treatment at 14:3-15, CHO
19 Demurrer Exhibit A. Although appeal was not taken, appellate review was available.

20 Finally, plaintiffs had another opportunity to more fully litigate the death issue in
21 October 2014 when it submitted the Declarations of Philip De Fina, Ph.D., Calixto
22 Machado, M.D., Charles J. Prestigiacomma, M.D., Elena B. Labkovsky, Ph.D., and Alan
23 Shewmon, M.D. in support of its Petition asking Judge Grillo to reconsider the January
24 2014 Judgment, CHO Demurrer Exhibit C 1-6.

25 But they elected to drop that Petition, deciding instead to re-litigate these same
26 issues in the present tort action, and have now raised the issues again in federal court
27 in what appears to be little more than attempts to find a more favorable forum. The new
28 federal complaint will require the court to answer the same question: Is Jahi legally dead

1 under California law. The federal complaint appears to be based on the testimony of the
2 same physicians and the same facts submitted in the October 2014 proceedings, which
3 are also now before this Court. Not only are plaintiffs seeking yet another forum in which
4 to litigate the death issue, they have not named CHO or any of the physicians named in
5 the medical malpractice action, apparently attempting to resolve this matter without
6 opposition from these clearly interested parties. Federal Complaint, Reply Exhibit A.

7 The death issue has been fully litigated. Neither law nor equity entitle plaintiff to
8 litigate this issue further.

9 3. The Burden of Proof

10 Disparate burdens of proof do not weigh against the application of collateral
11 estoppel here. In the December 2013 proceeding Judge Grillo concluded that the
12 Hospital must prove death by clear and convincing evidence. 1/2/2014 Amended Order
13 Denying the Petition For Medical at 16:9-22, CHO Demurrer Exhibit A. In the prior
14 action, *defendants*, not plaintiff, had the burden to prove death and it was a high burden.

15 4. Sound Public Policy

16 A determination of death that is not final and permanent serves no purpose. The
17 public policy interests at stake in maintaining the integrity and finality of the medical and
18 judicial determination of death far outweighs a plaintiff's desire to maximize monetary
19 damages in a tort action. Neither law nor equity requires setting aside the principles of
20 collateral estoppel and the interests they serve in this case.

21 The medical community has already addressed question of whether Jahi is still
22 alive, and broadly accepted medical science has determined that she is not. The
23 American Academy of Pediatrics' Guidelines were developed by a task force that
24 included the Society of Critical Care Medicine (section on Critical Care and section on
25 Neurology), the American Academy of Pediatrics, and the Child Neurology Society, and
26 are broadly accepted by the medical community as the standard for determining
27 irreversible brain death in children. 10/6/2014 Letter of Paul Fisher M.D., Exhibit D at
28 17-18, 4, and 16-18. If plaintiffs and their experts disagree, they must address their

1 concerns on these issues to the medical community that approved the medical
2 standards for determining irreversible brain death, and the legislatures that enacted the
3 Uniform Determination of Death Act. As a matter of sound public policy, these are not
4 matters appropriately determined on a case by case basis by courts or juries in
5 individual tort actions.

6 A final determination of death was made according to the accepted medical
7 standards and confirmed by the Court. The principles of collateral estoppel apply and
8 preclude the re-litigation of this issue here.

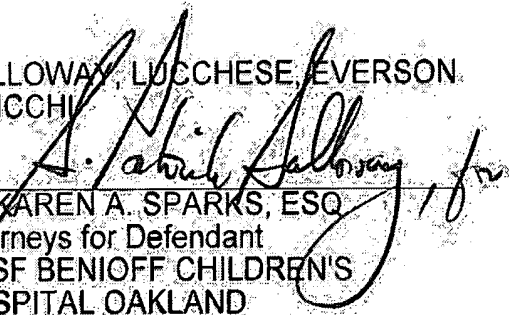
9 IV.

10 CONCLUSION

11 Jahi is legally dead under California law. There are no grounds for re-litigating
12 this issue. Jahi does not therefore have standing to assert a personal injury cause of
13 action. The demurrer to the first cause of action should be sustained. The conditional
14 phrase "*In the event that it is determined that Jahi succumbed to the injuries caused by*
15 *the negligence of the defendants*" (FAC at 13:27) improperly ignores the determination
16 of death and contemplates a re-litigation of this issue, and it should be stricken.

17
18 Dated: December 31, 2015

19 GALLOWAY, LUCCHESI, EVERSON
& PICCHI

20 By: 
21 KAREN A. SPARKS, ESQ
22 Attorneys for Defendant
23 UCSF BENIOFF CHILDREN'S
24 HOSPITAL OAKLAND