



ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Bruce M. Brusavich, SBN 93578/Terry S. Schneier, SBN 118322 AGNEWBRUSAVICH, 20355 Hawthorne Blvd., 2nd Fl. Torrance, CA 90503  TELEPHONE NO.: (310) 793-1400      FAX NO. (Optional): (310) 793-1499 E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): Plaintiffs LATASHA NAILAH SPEARS WINKFIELD; et al.	FOR COURT USE ONLY  <b>FILED</b> ALAMEDA COUNTY  MAR 16 2017  CLERK OF THE SUPERIOR COURT By <i>M. Williams</i> Deputy
SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA STREET ADDRESS: 1221 Oak Street MAILING ADDRESS: 1221 Oak Street CITY AND ZIP CODE: Oakland, CA 94612 BRANCH NAME:	
PLAINTIFF/PETITIONER: Latasha Nailah Spears Winkfield; et al. DEFENDANT/RESPONDENT: Frederick S. Rosen, M.D.; et al.	
<b>CASE MANAGEMENT STATEMENT</b> (Check one): <input checked="" type="checkbox"/> UNLIMITED CASE (Amount demanded exceeds \$25,000) <input type="checkbox"/> LIMITED CASE (Amount demanded is \$25,000 or less)	CASE NUMBER: RG 15760730  <b>FAX FILE</b>
A CASE MANAGEMENT CONFERENCE is scheduled as follows: Date: April 3, 2017      Time: 3:00 p.m.      Dept.: "16"      Div.:      Room: Address of court (if different from the address above): 1221 Oak Street, Oakland, CA <input checked="" type="checkbox"/> Notice of Intent to Appear by Telephone, by (name): Bruce M. Brusavich and/or Terry S. Schneier	

**INSTRUCTIONS: All applicable boxes must be checked, and the specified information must be provided.**

1. Party or parties (answer one):
  - a.  This statement is submitted by party (name): Plaintiffs LATASHA NAILAH SPEARS WINKFIELD; et al.
  - b.  This statement is submitted jointly by parties (names):
  
2. Complaint and cross-complaint (to be answered by plaintiffs and cross-complainants only)
  - a. The complaint was filed on (date): February 2, 2015
  - b.  The cross-complaint, if any, was filed on (date):
  
3. Service (to be answered by plaintiffs and cross-complainants only)
  - a.  All parties named in the complaint and cross-complaint have been served, have appeared, or have been dismissed.
  - b.  The following parties named in the complaint or cross-complaint
    - (1)  have not been served (specify names and explain why not):
    - (2)  have been served but have not appeared and have not been dismissed (specify names):
    - (3)  have had a default entered against them (specify names):
  - c.  The following additional parties may be added (specify names, nature of involvement in case, and date by which they may be served):  
 Unknown at this time. They may not be dismissed or severed pursuant to Government Code Section 68616(h).
  
4. Description of case
  - a. Type of case in  complaint     cross-complaint    (Describe, including causes of action):  
 Medical Malpractice

PLAINTIFF/PETITIONER: Latasha Nailah Spears Winkfield; et al.	CASE NUMBER: RG 15760730
DEFENDANT/RESPONDENT: Frederick S. Rosen, M.D.; et al.	

4. b. Provide a brief statement of the case, including any damages. *(If personal injury damages are sought, specify the injury and damages claimed, including medical expenses to date [indicate source and amount], estimated future medical expenses, lost earnings to date, and estimated future lost earnings. If equitable relief is sought, describe the nature of the relief.)*  
 After surgery Jahi bled for several hours while her mother and grandmother (a nurse) watched and repeatedly asked for a doctor. Jahi finally coded and her heart stopped. Defendants contend she was pronounced clinically brain dead. Plaintiffs contend Jahi suffered severe brain damage but does not currently meet the statutory definition of clinical brain death.

*(If more space is needed, check this box and attach a page designated as Attachment 4b.)*

5. **Jury or nonjury trial**

The party or parties request  a jury trial  a nonjury trial. *(If more than one party, provide the name of each party requesting a jury trial):*

6. **Trial date**

a.  The trial has been set for *(date)*:

b.  No trial date has been set. This case will be ready for trial within 12 months of the date of the filing of the complaint *(if not, explain)*:

This case is complex.

c. Dates on which parties or attorneys will not be available for trial *(specify dates and explain reasons for unavailability)*:  
 Please see the attached List of Trials.

7. **Estimated length of trial**

The party or parties estimate that the trial will take *(check one)*:

a.  days *(specify number)*: 45 days

b.  hours *(short causes) (specify)*:

8. **Trial representation (to be answered for each party)**

The party or parties will be represented at trial  by the attorney or party listed in the caption  by the following:

a. Attorney:

b. Firm:

c. Address:

d. Telephone number:

f. Fax number:

e. E-mail address:

g. Party represented:

Additional representation is described in Attachment 8.

9. **Preference**

This case is entitled to preference *(specify code section)*:

10. **Alternative dispute resolution (ADR)**

a. **ADR information package.** Please note that different ADR processes are available in different courts and communities; read the ADR information package provided by the court under rule 3.221 for information about the processes available through the court and community programs in this case.

(1) For parties represented by counsel: Counsel  has  has not provided the ADR information package identified in rule 3.221 to the client and reviewed ADR options with the client.

(2) For self-represented parties: Party  has  has not reviewed the ADR information package identified in rule 3.221.

b. **Referral to judicial arbitration or civil action mediation (if available).**

(1)  This matter is subject to mandatory judicial arbitration under Code of Civil Procedure section 1141.11 or to civil action mediation under Code of Civil Procedure section 1775.3 because the amount in controversy does not exceed the statutory limit.

(2)  Plaintiff elects to refer this case to judicial arbitration and agrees to limit recovery to the amount specified in Code of Civil Procedure section 1141.11.

(3)  This case is exempt from judicial arbitration under rule 3.811 of the California Rules of Court or from civil action mediation under Code of Civil Procedure section 1775 et seq. *(specify exemption)*:

PLAINTIFF/PETITIONER: Latasha Nailah Spears Winkfield; et al. DEFENDANT/RESPONDENT: Frederick S. Rosen, M.D.; et al.	CASE NUMBER: RG 15760730
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10. c. Indicate the ADR process or processes that the party or parties are willing to participate in, have agreed to participate in, or have already participated in (*check all that apply and provide the specified information*):

	The party or parties completing this form <b>are willing to</b> participate in the following ADR processes ( <i>check all that apply</i> ):	If the party or parties completing this form in the case <b>have agreed to</b> participate in or have already completed an ADR process or processes, indicate the status of the processes ( <i>attach a copy of the parties' ADR stipulation</i> ):
(1) Mediation	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> Mediation session not yet scheduled <input type="checkbox"/> Mediation session scheduled for ( <i>date</i> ): <input type="checkbox"/> Agreed to complete mediation by ( <i>date</i> ): <input type="checkbox"/> Mediation completed on ( <i>date</i> ):
(2) Settlement conference	<input type="checkbox"/>	<input type="checkbox"/> Settlement conference not yet scheduled <input type="checkbox"/> Settlement conference scheduled for ( <i>date</i> ): <input type="checkbox"/> Agreed to complete settlement conference by ( <i>date</i> ): <input type="checkbox"/> Settlement conference completed on ( <i>date</i> ):
(3) Neutral evaluation	<input type="checkbox"/>	<input type="checkbox"/> Neutral evaluation not yet scheduled <input type="checkbox"/> Neutral evaluation scheduled for ( <i>date</i> ): <input type="checkbox"/> Agreed to complete neutral evaluation by ( <i>date</i> ): <input type="checkbox"/> Neutral evaluation completed on ( <i>date</i> ):
(4) Nonbinding judicial arbitration	<input type="checkbox"/>	<input type="checkbox"/> Judicial arbitration not yet scheduled <input type="checkbox"/> Judicial arbitration scheduled for ( <i>date</i> ): <input type="checkbox"/> Agreed to complete judicial arbitration by ( <i>date</i> ): <input type="checkbox"/> Judicial arbitration completed on ( <i>date</i> ):
(5) Binding private arbitration	<input type="checkbox"/>	<input type="checkbox"/> Private arbitration not yet scheduled <input type="checkbox"/> Private arbitration scheduled for ( <i>date</i> ): <input type="checkbox"/> Agreed to complete private arbitration by ( <i>date</i> ): <input type="checkbox"/> Private arbitration completed on ( <i>date</i> ):
(6) Other ( <i>specify</i> ):	<input type="checkbox"/>	<input type="checkbox"/> ADR session not yet scheduled <input type="checkbox"/> ADR session scheduled for ( <i>date</i> ): <input type="checkbox"/> Agreed to complete ADR session by ( <i>date</i> ): <input type="checkbox"/> ADR completed on ( <i>date</i> ):

PLAINTIFF/PETITIONER: Latasha Nailah Spears Winkfield; et al.	CASE NUMBER: RG 15760730
DEFENDANT/RESPONDENT: Frederick S. Rosen, M.D.; et al.	

11. Insurance

- a.  Insurance carrier, if any, for party filing this statement (*name*):
- b. Reservation of rights:  Yes  No
- c.  Coverage issues will significantly affect resolution of this case (*explain*):

12. Jurisdiction

Indicate any matters that may affect the court's jurisdiction or processing of this case and describe the status.

- Bankruptcy  Other (*specify*):

Status:

13. Related cases, consolidation, and coordination

- a.  There are companion, underlying, or related cases.
  - (1) Name of case: Jahi McMath, a minor; et al. v. State of California; et al.
  - (2) Name of court: United States District Court for the Northern District of California
  - (3) Case number: 4:15-cv-06042
  - (4) Status: Pending
- Additional cases are described in Attachment 13a.
- b.  A motion to  consolidate  coordinate will be filed by (*name party*):

14. Bifurcation

- The party or parties intend to file a motion for an order bifurcating, severing, or coordinating the following issues or causes of action (*specify moving party, type of motion, and reasons*):  
 Judge Freedman liked plaintiffs' suggestion to bifurcate liability & encouraged plaintiffs' counsel to file such a motion, which was filed again with an intended hearing date of 3/28/17. \*\*\* (See Attachment 14a for additional)

15. Other motions

- The party or parties expect to file the following motions before trial (*specify moving party, type of motion, and issues*):

16. Discovery

- a.  The party or parties have completed all discovery.
- b.  The following discovery will be completed by the date specified (*describe all anticipated discovery*):

<u>Party</u>	<u>Description</u>	<u>Date</u>
Plaintiffs	All discovery allowed pursuant to the Code of Civil Procedure, including depositions, interrogatories, request for production, request for admissions and document subpoenas	Per Code
Plaintiffs	Expert Discovery	Per Code

- c.  The following discovery issues, including issues regarding the discovery of electronically stored information, are anticipated (*specify*):

PLAINTIFF/PETITIONER: Latasha Nailah Spears Winkfield; et al.	CASE NUMBER: RG 15760730
DEFENDANT/RESPONDENT: Frederick S. Rosen, M.D.; et al.	

17. Economic litigation

- a.  This is a limited civil case (i.e., the amount demanded is \$25,000 or less) and the economic litigation procedures in Code of Civil Procedure sections 90-98 will apply to this case.
- b.  This is a limited civil case and a motion to withdraw the case from the economic litigation procedures or for additional discovery will be filed (if checked, explain specifically why economic litigation procedures relating to discovery or trial should not apply to this case):

18. Other issues

- The party or parties request that the following additional matters be considered or determined at the case management conference (specify):

U.S. District Court Judge Haywood S. Gillian, Jr. recently granted a stay in part of the proceeding in Jahi McMath v. State of CA, Case No. 15-cv-06042-HSG pending a determination in this action as to "whether a brain death diagnosis under California Health & Safety Code secs. 7180 and 7181 can or must be overturned based on subsequent evidence of brain function." A copy of the Order is attached as Exhibit "1".

19. Meet and confer

- a.  The party or parties have met and conferred with all parties on all subjects required by rule 3.724 of the California Rules of Court (if not, explain):

There have been meet and confers for prior CMC hearings and nothing has changed.

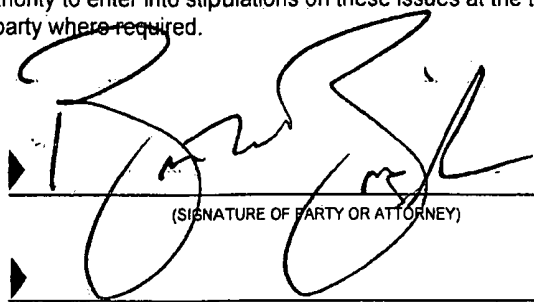
- b. After meeting and conferring as required by rule 3.724 of the California Rules of Court, the parties agree on the following (specify):

20. Total number of pages attached (if any): 15

I am completely familiar with this case and will be fully prepared to discuss the status of discovery and alternative dispute resolution, as well as other issues raised by this statement, and will possess the authority to enter into stipulations on these issues at the time of the case management conference, including the written authority of the party where required.

Date: March 15, 2017

BRUCE M. BRUSAVICH  
\_\_\_\_\_  
(TYPE OR PRINT NAME)

  
\_\_\_\_\_  
(SIGNATURE OF PARTY OR ATTORNEY)

\_\_\_\_\_  
(TYPE OR PRINT NAME)

\_\_\_\_\_  
(SIGNATURE OF PARTY OR ATTORNEY)

Additional signatures are attached.

Attachment 6C.

LIST OF TRIALS FOR AGNEWBRUSAVICH

Trial week of: 3/21/17; 4/3/17; 6/5/17; 6/14/17; 6/22/17; 7/5/17; 7/31/17; 8/1/17;  
8/28/17; 9/5/17; 9/14/17; 11/6/17; 12/4/17; 12/21/17; 2/1/18; 2/2/18; 3/7/18;  
4/19/18; 4/27/18; 5/1/18; 5/30/18; 6/1/18

SHORT TITLE: WINKFIELD; et al. v. ROSEN, M.D.; et al.	CASE NUMBER: RG 15760730
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ATTACHMENT (Number): 13a*(This Attachment may be used with any Judicial Council form.)*

## Attachment 13a

- (1) Milton McMath v. Rosen; et al.
- ~~(2) Alameda County Superior Court, Dept. "20"~~
- (3) Case Number: RG 15796121
- (4) Being dismissed pursuant to representation of counsel for Milton McMath

*(If the item that this Attachment concerns is made under penalty of perjury, all statements in this Attachment are made under penalty of perjury.)*

Page 7 of 8  
*(Add pages as required)*

SHORT TITLE: WINKFIELD, et al. v. ROSEN, M.D., et al.	CASE NUMBER: RG 15760730
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ATTACHMENT (Number): 14a*(This Attachment may be used with any Judicial Council form.)*

## Attachment 14a

However, counsel for Dr. Rosen requested that the motion be taken off calendar and reset to accommodate their pre-planned family vacation. The motion has been filed with a new hearing date of April 27, 2017.

*(If the item that this Attachment concerns is made under penalty of perjury, all statements in this Attachment are made under penalty of perjury.)*

Page 8 of 8  
*(Add pages as required)*



EXHIBIT 1

EXHIBIT

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JAHl MCMATH, et al.,  
Plaintiffs,  
v.  
STATE OF CALIFORNIA, et al.,  
Defendants.

Case No. 15-cv-06042-HSG

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTIONS TO  
DISMISS AND STAYING CASE**

Re: Dkt. Nos. 35, 48, 69

United States District Court  
Northern District of California

Pending before the Court are three motions: (1) a motion to dismiss, or in the alternative to stay, brought by Defendants State of California, California Department of Public Health, Tony Agurto, and Dr. Karen Smith (together, the "State Defendants"), Dkt. No. 35; (2) a motion to dismiss or to abstain brought by Defendants County of Alameda, Alameda County Department of Public Health, Dr. Muntu Davis, Alameda County Coroner & Medical Examiner, Alameda County Counsel, David Nefouse, Scott Dickey, Alameda County Clerk's Office, Patrick O'Connell, Alameda County Sheriff's Office, and Jessica D. Horn (together, the "County Defendants"), Dkt. No. 48; and (3) a motion to dismiss, or in the alternative stay, brought by Intervenor Defendants UCSF Benioff Children's Hospital and Dr. Frederick S. Rosen, Dkt. No. 69. For the reasons articulated below, the Court GRANTS IN PART and DENIES IN PART the motions to dismiss, and STAYS this action.<sup>1</sup>

<sup>1</sup> The parties have submitted several requests for judicial notice. See Dkt. Nos. 36, 47, 52, 61, 63, 69-1, 75-4, 77-1, 83. The Court GRANTS the requests to take judicial notice of court documents and filings in other actions because they are public documents that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." See Fed. R. Evid. 201(b). Because the Court does not rely on the remainder of the documents that the parties have submitted for judicial notice, the Court DENIES AS MOOT the remainder of the parties' requests.

1       **I. BACKGROUND**

2           **A. Factual History**

3           This action arises out of a tragic sequence of events. On December 9, 2013, Plaintiff Jahi  
4       McMath received a tonsillectomy and adenoidectomy at Children's Hospital Oakland<sup>2</sup> ("CHO").  
5       Dkt. No. 1 ("Compl.") ¶ 1. Following the routine surgery, Ms. McMath experienced excessive  
6       blood loss that eventually led to cardiac arrest. *See id.* ¶¶ 1-5. After extensive CPR and fluid  
7       administration, the CHO staff was able to restart Ms. McMath's heart, and Ms. McMath was  
8       placed on a ventilator. *Id.* ¶ 6. On December 12, 2013, CHO doctors officially pronounced Ms.  
9       McMath "brain dead." *Id.* ¶ 8.

10           Despite Ms. McMath's official diagnosis of brain death, Ms. McMath's mother, Nailah  
11       Winkfield, continues to believe that her daughter is alive. *See id.* ¶ 18. As such, after filing  
12       several lawsuits, Winkfield secured a death certificate for Ms. McMath so that Winkfield could  
13       transport her to a medical facility in New Jersey where there is a religious exemption for brain  
14       death. *See id.* ¶¶ 11-13. Ms. McMath and Winkfield have remained in New Jersey since. *See id.*  
15       ¶¶ 13-14, 19.

16           **B. Procedural History**

17           On December 23, 2015, Plaintiffs Ms. McMath and Winkfield filed this action against the  
18       State Defendants and County Defendants, requesting (1) a declaration that Ms. McMath is not  
19       now and was never "brain dead" under California Health and Safety Code §§ 7180 and 7181; (2)  
20       an injunction requiring Defendants to invalidate Ms. McMath's Certificate of Death and expunge  
21       all related records; (3) a declaration that Ms. McMath has the right to receive healthcare as a living  
22       human being; and (4) a declaration that Ms. Winkfield has the right to exercise control over Ms.  
23       McMath's healthcare. *See generally* Compl. Plaintiffs assert claims under (i) 42 U.S.C. § 1983  
24       for violations of their First, Fourth, Fifth, and Fourteenth Amendment rights; (ii) § 504 of the  
25       Federal Rehabilitation Act of 1973; (iii) the Americans with Disabilities Act; and (iv) the  
26       Religious Land Use and Institutionalized Persons Act. *Id.* At the May 12, 2016, hearing on  
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28       <sup>2</sup> Children's Hospital Oakland is now UCSF Benioff Children's Hospital Oakland.

1 Defendants' motions to dismiss, the Court granted the Intervenor Defendants' motion to intervene.  
2 Dkt. No. 68.

3 In addition to this lawsuit, there are five other proceedings arising from the same nucleus  
4 of facts that warrant discussion: (1) a 2013 state court probate action filed in Alameda Superior  
5 Court ("Probate Action"); (2) a first federal action filed in 2013 ("2013 Federal Action"); (3) a  
6 state court writ petition appealing the probate court's findings ("2013 Writ Petition"); (4) a 2014  
7 petition for writ of error coram nobis requesting that the Alameda Superior Court overturn its  
8 finding of brain death ("Petition for Writ of Error Coram Nobis"); and (5) a pending state court  
9 action seeking either personal injury or wrongful death damages ("Damages Action").

10 **i. Probate Action**

11 On December 20, 2013, Winkfield filed an action in Alameda County Superior Court  
12 seeking an emergency ex parte temporary restraining order ("TRO") to prevent CHO from  
13 removing Ms. McMath from life support and to require CHO to provide her with further medical  
14 care. Dkt. No. 69-2, Exh. A ("Ex Parte Petition") ¶¶ 4-5. CHO opposed the Ex Parte Petition,  
15 arguing that it had no duty to provide continuing medical support to Ms. McMath because she was  
16 deceased as a result of brain death. Dkt. No. 69-2, Exh. B. After hearing testimony and evidence  
17 from several physicians, including from court-appointed independent physician Dr. Paul Fisher,  
18 Judge Grillo found by "clear and convincing evidence . . . on December 24, 2013, that [Ms.  
19 McMath] had suffered brain death and was deceased as defined under Health and Safety Code  
20 sections 7180 and 7181." Dkt. No. 36-2, Ex. D at 16:20-22. Accordingly, Judge Grillo denied  
21 Winkfield's Ex Parte Petition and ordered CHO to continue providing Ms. McMath with treatment  
22 and support only until December 30, 2013, at 5:00 pm. *Id.* at 1, 19.

23 On January 17, 2014, Judge Grillo denied Winkfield's renewed motion for a court order  
24 requiring CHO to insert feeding and tracheal tubes into Ms. McMath. Dkt. No. 36-2, Ex. E at 1-2.  
25 Judge Grillo held that Ms. McMath had "been found to be brain dead pursuant to Health and  
26 Safety Code sections 7180-7181," and thus the feeding and tracheal tubes "would arguably be  
27 medically ineffective or contrary to generally accepted health care standards, or could violate  
28 medical or ethical norms." *Id.* at 2. Thereafter, Judge Grillo entered final judgment denying

United States District Court  
Northern District of California

1 Winkfield's petition. Dkt. No. 36-2, Ex. F.

2 **ii. 2013 Federal Action**

3 On December 30, 2013, Winkfield filed an action in the United States District Court for  
4 the Northern District of California. Compl. ¶ 64; Dkt. No. 69-3, Ex. F. Among other relief,  
5 Winkfield requested an injunction "precluding removal of ventilator support and mandating  
6 introduction of nutritional support, insertion of a tracheostomy tube [and] gastric tube, and to  
7 provide other medical treatments and protocols designed to promote [Ms. McMath's] maximum  
8 level of medical improvement and provision of sufficient time for Plaintiff to locate an alternate  
9 facility to care for [Ms. McMath] in accordance with her religious beliefs." *Id.* at 15.

10 After attending a settlement conference with a Magistrate Judge, the parties were able to  
11 reach a settlement that allowed Winkfield to remove her daughter from CHO. Compl. ¶¶ 64-65.

12 **iii. 2013 Writ Petition**

13 Also on December 30, 2013, Ms. McMath, by and through Winkfield, petitioned the  
14 California Court of Appeal for a writ of mandate directing the Alameda Superior Court to "reverse  
15 and vacate its Order of December 26, 2013, denying Plaintiff Winkfield's Petition to continue life  
16 support measures, and transfer the minor, McMath." Dkt. No. 69-3, Ex. F at 1. The Court of  
17 Appeal temporarily stayed Judge Grillo's order for 24 hours in order to consider the writ petition  
18 on its merits. Dkt. No. 69-3, Ex. G at 1. On January 6, 2014, the Court of Appeal denied as moot  
19 Plaintiffs' petition for writ of mandate because Ms. McMath had been removed from CHO as a  
20 result of the negotiated settlement in the 2013 Federal Action. *Id.* at 3.

21 **iv. Petition for Writ of Error Coram Nobis**

22 On October 3, 2014, Ms. McMath, by and through Winkfield, filed a Writ of Error Coram  
23 Nobis in Alameda Superior Court. Dkt. No. 69-4, Ex. K. Plaintiffs requested that the Alameda  
24 Superior Court reverse its determination that Ms. McMath had suffered brain death in light of new  
25 evidence. *Id.*

26 In response to the petition, Judge Grillo again appointed Dr. Fisher as the court-appointed  
27 expert witness. Dkt. No. 69-6, Ex. Q. Plaintiffs' objected to Dr. Fisher's appointment, and  
28 thereafter, on October 9, 2014, withdrew their Petition for Writ of Error Coram Nobis. Dkt. No.

1 69-6, Ex. R at 4.

2 In his order acknowledging Plaintiffs' withdrawal of their petition, Judge Grillo informed  
3 Plaintiffs that they could seek future relief in his court by requesting a case management  
4 conference at a later date. *Id.*

5 **v. Damages Action**

6 Finally, Plaintiffs and other family members have brought a medical malpractice action  
7 against Dr. Rosen and CHO that is currently proceeding in Alameda County Superior Court. *See*  
8 Dkt. No. 69-7, Ex. S. The Damages Action plaintiffs seek personal injury damages or, in the  
9 alternative, wrongful death damages. *Id.*

10 Dr. Rosen and CHO demurred to the first amended complaint in the Damages Action on  
11 the basis that Judge Grillo had already determined the fact of Ms. McMath's brain death in the  
12 Probate Action. Dkt. No. 69-7, Exs. T, U. According to Dr. Rosen and CHO, any personal injury  
13 claims were barred by, among other theories, collateral estoppel and res judicata. *Id.*

14 Judge Robert Freedman of Alameda County Superior Court overruled the demurrers  
15 brought by Dr. Rosen and CHO. Dkt. No. 69-7, Exs. W, X. Judge Freedman also certified two  
16 questions to the California Court of Appeal: (1) whether Judge Grillo's determination of brain  
17 death in the Probate Action is entitled to collateral estoppel in a subsequent civil case seeking  
18 personal injury damages and whether collateral estoppel on this basis should be determined at the  
19 pleading stage; and (2) whether Judge Grillo's determination of brain death in the Probate Action  
20 should be accorded finality for all purposes pertaining to Ms. McMath's brain death status unless  
21 Judge Grillo's order is set aside on appeal or otherwise. Dkt. No. 69-7, Ex. Y.

22 On July 12, 2016, the California Court of Appeal held that Dr. Rosen and CHO's argument  
23 that Judge Grillo's brain death determination is entitled to collateral estoppel "should not be  
24 resolved at the pleading stage." Dkt. No. 77-3, Ex. A at 3; *see also* Dkt. No. 83-1, Ex. B.

25 **II. DISCUSSION**

26 On March 3, 2016, the State Defendants filed a motion to dismiss, or in the alternative to  
27 stay, this action under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Dkt. No. 35 ("State  
28 MTD"). The State Defendants move to dismiss or stay this action on four grounds: (i) the Court

1 lacks subject matter jurisdiction under the *Rooker-Feldman* doctrine; (ii) the complaint is barred  
2 by the Eleventh Amendment because there is an insufficient nexus between the State Defendants  
3 and the challenged acts; (iii) Plaintiffs' first through sixth claims fail to state a claim; and (iv) if  
4 the Court declines to dismiss the complaint, the action should be stayed under *Colorado River*. *Id.*

5 On March 16, 2016, the County Defendants moved to dismiss the complaint or, in the  
6 alternative, requested that the Court abstain from hearing the matter. Dkt. No. 48 ("County  
7 MTD"). The County Defendants articulate three main arguments in support of their motion: (i)  
8 Plaintiffs have failed to exhaust available state court procedures; (ii) the Court lacks subject matter  
9 jurisdiction under the *Rooker-Feldman* doctrine; and (iii) the Court should abstain under the  
10 *Younger* doctrine or other similar doctrines such as *Pullman*, *Colorado River*, and *Burford*. *Id.*

11 Finally, on May 20, 2016, the Intervenor Defendants moved to dismiss or stay this action.  
12 Dkt. No. 69 ("Intervenors' MTD"). The Intervenor Defendants move to dismiss on three bases:  
13 (i) reconsideration of Ms. McMath's brain death diagnosis is barred by the doctrines of res  
14 judicata and collateral estoppel; (ii) the Court should decline to consider Plaintiffs' request for a  
15 declaration that Ms. McMath is not brain dead under the Declaratory Judgment Act; and (iii) the  
16 Court should dismiss the complaint based on "a host of legal doctrines" included in the State and  
17 County Defendants' motions. *Id.*

18 The State Defendants, County Defendants, and Intervenor Defendants each join in each  
19 other's arguments. *Id.* at 24; Dkt. No. 73 at 22:18-23:13.

20 **A. Rule 12(b)(1) Legal Standard**

21 Rule 12(b)(1) allows a defendant to move for dismissal on the ground that a court lacks  
22 jurisdiction over the subject matter of an action. Fed. R. Civ. P. 12(b)(1). The plaintiff bears the  
23 burden of establishing a court's subject matter jurisdiction. *See Assoc. of Am. Medical Colleges v.*  
24 *United States*, 217 F.3d 770, 778-79 (9th Cir. 2000); *Kokkonen v. Guardian Life Ins. Co. of*  
25 *America*, 511 U.S. 375, 376-78 (1994).

26 "A complaint will be dismissed if, looking at the complaint as a whole, it appears to lack  
27 federal jurisdiction either 'facially' or 'factually.'" *Thornhill Publishing Co., Inc. v. General Tel.*  
28 *& Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). In resolving a "facial" attack, a court limits its



1 inquiry to a plaintiff's allegations, which are taken as true, and construes the allegations in the  
2 light most favorable to the plaintiff. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th  
3 Cir. 2004); *NL Indus. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

4 **B. Rule 12(b)(6) Legal Standard**

5 Federal Rule of Civil Procedure 8(a) requires that a complaint contain "a short and plain  
6 statement of the claim showing that the pleader is entitled to relief[.]" A defendant may move to  
7 dismiss a complaint for failing to state a claim upon which relief can be granted under Federal  
8 Rule of Civil Procedure 12(b)(6). "Dismissal under Rule 12(b)(6) is appropriate only where the  
9 complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory."  
10 *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). To survive a Rule  
11 12(b)(6) motion, a plaintiff must plead "enough facts to state a claim to relief that is plausible on  
12 its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 540, 570 (2007). A claim is facially plausible  
13 when a plaintiff pleads "factual content that allows the court to draw the reasonable inference that  
14 the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

15 In reviewing the plausibility of a complaint, courts "accept factual allegations in the  
16 complaint as true and construe the pleadings in the light most favorable to the nonmoving party."  
17 *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Nonetheless,  
18 courts do not "accept as true allegations that are merely conclusory, unwarranted deductions of  
19 fact, or unreasonable inferences." *In re Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir.  
20 2008).

21 **C. Analysis**

22 The Court begins by addressing Defendants' argument that the Court lacks subject matter  
23 jurisdiction, then considers Defendants' alternate position that the Court should stay this action  
24 pending the outcome of California state court proceedings.

25 **i. Rooker-Feldman Doctrine**

26 Defendants argue that the Court lacks subject matter jurisdiction over Plaintiffs' complaint  
27 under the *Rooker-Feldman* doctrine.

28 The *Rooker-Feldman* doctrine "bars federal courts from exercising subject-matter

1 jurisdiction over a proceeding in ‘which a party losing in state court’ seeks ‘what in substance  
2 would be appellate review of the state judgment in a United States district court, based on the  
3 losing party’s claim that the state judgment itself violates the loser’s federal rights.’” *Doe v.*  
4 *Mann*, 415 F.3d 1038, 1041 (9th Cir. 2005) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1005–  
5 06 (1994)). The *Rooker-Feldman* doctrine applies unless Congress has granted federal district  
6 courts statutory authority to review certain state court judgments. *See id.* The Ninth Circuit has  
7 interpreted *Rooker-Feldman* to bar jurisdiction “[i]f a federal plaintiff asserts as a legal wrong an  
8 allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on  
9 that decision.” *Noel v. Hall*, 341 F.3d 1148, 1164 (9th Cir. 2003). *Rooker-Feldman* does not bar  
10 an action in which “a federal plaintiff asserts as a legal wrong an allegedly illegal act or omission  
11 by an adverse party.” *Id.* If a district court finds that it lacks jurisdiction to hear an issue under  
12 *Rooker-Feldman*, the court must also “refuse to decide any issue raised in the suit that is  
13 ‘inextricably intertwined’ with an issue resolved by the state court in its judicial decision.” *Noel*,  
14 341 F.3d at 1158.

15 Here, *Rooker-Feldman* bars some, but not all, of Plaintiffs’ claims. In the Probate Action,  
16 Judge Grillo found by “clear and convincing evidence . . . on December 24, 2013, that [Ms.  
17 McMath] had suffered brain death and was deceased as defined under Health and Safety Code  
18 sections 7180 and 7181.” Dkt. No. 36-2, Ex. D at 16:20-22. Thus, under *Rooker-Feldman*,  
19 Plaintiffs cannot appeal Judge Grillo’s determination that as of December 24, 2013, Ms. McMath  
20 was “brain dead.” In other words, *Rooker-Feldman* prohibits Plaintiffs’ request for a declaration  
21 that Ms. McMath “did not suffer, on December 13, 2013, irreversible cessation of all functions of  
22 the entire brain, including the brain stem” and that Ms. McMath “was not ever ‘brain dead’ by  
23 pertinent California statute.” *See, e.g.,* Compl. ¶¶ 249, 250. However, Plaintiffs bring several  
24 other claims, including a request “to present to a court for the first time evidence of [Ms.]  
25 McMath’s neurological function subsequent to the issuance of her facially invalid death  
26 certificate.” Dkt. No. 60 (Opp’n to State MTD”) at 13. Relatedly, Plaintiffs assert that  
27 Defendants’ failure to invalidate, correct, or amend Ms. McMath’s death certificate in light of this  
28 subsequent evidence violates her constitutional rights. These claims founded on evidence not

1 before Judge Grillo do not seek to appeal his judgment, nor are they so inextricably intertwined  
2 with his judgment so as to deprive this Court of jurisdiction.

3 The Court finds that *Rooker-Feldman* deprives it of jurisdiction over Plaintiffs' claims that  
4 Ms. McMath never experienced brain death and was not brain dead on December 24, 2013.  
5 Accordingly, the Court GRANTS Defendants' requests to dismiss any such claims. However, the  
6 Court holds that Plaintiffs' remaining claims are not barred by *Rooker-Feldman* and DENIES  
7 Defendants' request as to all other claims.

8 ii. Abstention

9 Next, Defendants assert that the Court must stay or dismiss this action under a variety of  
10 abstention doctrines, including *Colorado River*, *Younger*, *Pullman*, and *Burford*. Because the  
11 Court finds that *Pullman* abstention is appropriate, the Court declines to address the other potential  
12 bases for abstaining from or staying this action.

13 *Pullman* abstention allows "federal courts to refrain from deciding sensitive federal  
14 constitutional questions when state law issues may moot or narrow the constitutional questions."  
15 *Porter v. Jones*, 319 F.3d 483, 492 (9th Cir. 2003). "Three factors must be present before a  
16 district court may abstain under the *Pullman* doctrine: (1) the complaint must involve a sensitive  
17 area of social policy that is best left to the states to address; (2) a definitive ruling on the state  
18 issues by a state court could obviate the need for federal constitutional adjudication by the federal  
19 court; and (3) the proper resolution of the potentially determinative state law issue is uncertain."  
20 *Fireman's Fund Ins. Co. v. City of Lodi, California*, 302 F.3d 928, 939-40 (9th Cir. 2002), as  
21 amended on denial of reh'g and reh'g en banc (Oct. 8, 2002) (internal quotations omitted).  
22 *Pullman* abstention requires all three of these factors and should be rarely applied "[i]n order to  
23 give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal  
24 constitutional claims." *Porter*, 319 F.3d at 492. If a court abstains under *Pullman*, the "federal  
25 plaintiff must then seek[] a definitive ruling in the state courts on the state law questions before  
26 returning to the federal forum." *1049 Mkt. St. LLC v. City & Cty. of San Francisco*, No. C 15-  
27 02075 JSW, 2015 WL 5676019, at \*2 (N.D. Cal. Sept. 28, 2015) (quoting *San Remo Hotel v. City*  
28 *& Cty. of San Francisco*, 145 F.3d 1095, 1104 (9th Cir. 1998)).

1           The Court finds that all three of the *Pullman* factors are present here. First, this action  
2 undeniably concerns sensitive areas of social policy best left to California to address: California's  
3 definition of brain death under Health and Safety Code §§ 7180 and 7181, and whether a diagnosis  
4 of brain death under California law subsequently can — or must — be overturned as a result of  
5 new evidence.

6           Second, a definitive ruling from the California courts regarding the state's policies for  
7 making and revisiting a determination of brain death under §§ 7180 and 7181 could obviate the  
8 need for this Court to adjudicate the alleged violations of Plaintiffs' federal constitutional rights.  
9 If the California courts conclude that §§ 7180 and 7181 permit or require a brain death diagnosis  
10 to be overturned as a result of new evidence, Defendants will be legally obligated to follow the  
11 California courts' guidance with respect to Ms. McMath's determination of brain death. Such a  
12 finding in that forum could moot this entire action, which asserts violations of Plaintiffs' federal  
13 constitutional rights as a result of Defendants' refusal to "reconsider[] and correct[] . . . [Ms.  
14 McMath's] diagnosis of death." *See* Compl. ¶ 15. Additionally, there remains a chance that the  
15 parties to the Damages Action will litigate whether Ms. McMath is currently brain dead, and that  
16 litigation also has the potential to moot or substantially narrow the federal constitutional questions  
17 presented here.

18           Third, the proper resolution of the potentially determinative state law issue is uncertain.  
19 "Uncertainty for purposes of *Pullman* abstention means that a federal court cannot predict with  
20 any confidence how the state's highest court would decide an issue of state law." *Pearl Inv. Co. v.*  
21 *City & Cty. of San Francisco*, 774 F.2d 1460, 1465 (9th Cir. 1985). "Resolution of an issue of  
22 state law might be uncertain because the particular statute is ambiguous, or because the precedents  
23 conflict, or because the question is novel and of sufficient importance that it ought to be addressed  
24 first by a state court." *Id.* The Court cannot envision an issue more novel and important than a  
25 state's policies surrounding a determination of death. In a case of first impression, Plaintiffs argue  
26 that, notwithstanding the superior court's December 2013 determination of brain death in the  
27 Probate Action, Ms. McMath "has regained brain function." Compl. ¶ 50. Essentially, Plaintiffs  
28 argue that even if the Court were to accept the December 2013 determination as accurate when

United States District Court  
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1 made, Ms. McMath now has come back to life. In this unique and novel situation, this Court  
2 cannot predict with any confidence how the California Supreme Court would interpret the finality  
3 of a brain death diagnosis under Health and Safety Code §§ 7180 and 7181. The uncertainty of  
4 this issue is further underscored by the fact that in the Damages Action, the superior court has  
5 held, and the California Court of Appeal has affirmed, that defendants' collateral estoppel  
6 argument cannot be resolved at the pleading stage. Dkt. No. 83-1, Ex. B; Dkt. No. 77-3 at 3; Dkt.  
7 No. 69-7, Exs. W, X. Accordingly, there remains an open question as to whether, under California  
8 Health and Safety Code §§ 7180 and 7181, Ms. McMath's brain death diagnosis can or must be  
9 overturned.

10 The Court finds that all three of the *Pullman* factors are present here, and this case thus  
11 presents the rare situation in which *Pullman* abstention is warranted. Accordingly, the Court  
12 STAYS this action pending the outcome of Plaintiffs' efforts to seek a determinative ruling from  
13 the California courts as to whether a brain death diagnosis under California Health and Safety  
14 Code §§ 7180 and 7181 can or must be overturned based on subsequent evidence of brain  
15 function.<sup>3</sup>

### 16 III. CONCLUSION

17 For the reasons above, the Court GRANTS IN PART and DENIES IN PART Defendants'  
18 motion to dismiss for lack of subject matter jurisdiction under *Rooker-Feldman*. The Court  
19 GRANTS the motion as to Plaintiffs' claims that Ms. McMath never experienced brain death and  
20 was incorrectly found to be brain dead on December 24, 2013. The Court DENIES the motion as  
21 to the remainder of Plaintiffs' claims.

22 //

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27 \_\_\_\_\_  
28 <sup>3</sup> Because the Court finds *Pullman* abstention appropriate here, the Court declines at this time to  
address the Defendants' remaining arguments in support of dismissing or staying the action.


United States District Court  
Northern District of California

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In addition, the Court STAYS this action under the *Pullman* abstention doctrine pending the outcome of Plaintiffs' efforts to seek a determinative ruling from the California courts as to whether under California Health and Safety Code §§ 7180 and 7181 a brain death diagnosis can or must be overturned based on subsequent evidence of brain function. The parties shall file joint status reports every 120 days updating the Court on the status of the Damages Action or any other California state court action addressing the issues identified in this order. The parties shall also file a joint status update within 10 days of the issuance of a final judgment in the Damages Action or any other California state court action addressing the issues identified in this order.

**IT IS SO ORDERED.**

Dated: 12/12/2016

  
HAYWOOD S. GILLIAM, JR.  
United States District Judge

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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 AGNEW BRUSAVICH, 20355 Hawthorne Blvd., 2<sup>nd</sup> Floor, Torrance, California. On March 15, 2017, I served the within document **CASE MANAGEMENT STATEMENT**

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:

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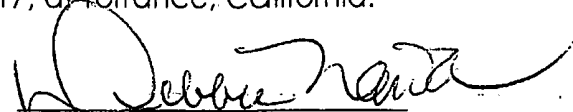
<p>Andrew N. Chang ESNER, CHANG &amp; BOYER Southern California Office 234 East Colorado Boulevard Suite 975 Pasadena, CA 91101 <a href="mailto:achang@ecbappeal.com">achang@ecbappeal.com</a></p>	<p>ASSOCIATE ATTORNEY FOR PLAINTIFFS LATASHA NAILAH SPEARS WINKFIELD; MARVIN WINIKFIELD; SANDREA CHATMANH; and JAH McMATH, a minor, by and through her Guardian ad Litem, LATASHA NAILAH SPEARS WINKFIELD</p> <p>(626) 535-9860 FAX (626) 535-9859</p>
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21 I am readily familiar with the firm's practices of collection and processing  
 22 correspondence for mailing. Under that practice, it would be deposited with the  
 23 U.S. Postal Service on that same day with postage thereon fully prepaid in the  
 24 ordinary course of business. I am aware that on motion of the party served,  
 25 service is presumed invalid if post cancellation date or postage meter date is  
 26 more than one day after date of deposit for mailing in affidavit.

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

28 Executed this 15th day of March, 2017, at Torrance, California.

  
 DEBBIE NAWA