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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 JAHI 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 - DEPT. "20"

PLAINTIFFS' NOTICE OF MOTION AND MOTION TO BIFURCATE TRIAL; MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATION OF BRUCE M. BRUSAVICH IN SUPPORT

DATE: April 27, 2017
TIME: 3:00 p.m.
DEPT: "16"

Reservation No: R-1832707

Date Action Filed: 03/03/15

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that on April 27, 2017 at 3:00 p.m. or as soon thereafter

as the matter may be heard in Department "16" of the above-entitled Court located at 1221 Oak St., Third Floor, Oakland, CA 94612, Plaintiffs Latasha Naila Spears Winkfield, Sandra Chatman and Jahi McMath, a minor by and through her Guardian ad Litem Latasha Nailah Spears Winkfield will move this Court for an order that bifurcates the issues of liability and causation of brain injury from the issues of brain function and damages during the trial phase of this matter pursuant to *Code of Civil Procedure* §§598 and 1048. Plaintiffs further request that the brain function/damages phase take place several months after the liability phase to permit extensive discovery to go forward in the interim.

This motion is made on the grounds that bifurcating the issues of liability and causation from the issues of brain function and damages will promote the convenience of witnesses and the efficiency, justice, fair handling of litigation as follows:

1. There is no dispute that Jahi suffered brain damage. The major issue in dispute is whether the brain damage *presently* meets the criteria of brain death. However, that issue need not be the subject of discovery or trial if all of the Defendants were not negligent in the care and treatment of Jahi McMath, which caused her brain injury. If fewer than all Defendants were negligent, then only those found negligent who contributed to the brain injury need proceed with the remaining issues for the discovery and the trial.

2. The presentation of witnesses and evidence related to whether or not Defendants committed medical malpractice that caused brain injury during and/or after the surgery of December 9, 2013 will require, at most, a 7-10 day trial. Plaintiffs anticipate that issues related to whether or not Jahi currently meets the definition of brain death and, if found to be alive, her injuries and damages, will consume months of discovery and likely multiple pre-trial hearings. This discovery will consist of depositions of the New Jersey physicians and medical providers who have treated Jahi and experts, including one in Cuba and several in Southern

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California. Any defense medical examination would also have to be conducted in New Jersey. Plaintiffs and Defendants both will rely on testimony from a host of treating physicians and medical and ethical experts to establish "brain life" or "brain death", and ultimately to establish the nature, extent, severity and prognosis for her injuries attributable to medical malpractice; and

3. The economic and efficient handling of the trial will be greatly enhanced by requiring that the issue of liability for medical malpractice be tried prior to, and separate from, any issues pertaining to the extent of brain damage and damages. Namely, the Court may save witnesses, jurors, court staff, attorneys and parties several weeks of trial in a case where Plaintiffs may not prevail on the issue of liability; and

4. Any testimony in this action regarding whether or not Jahi currently meets the definition of brain death, and her damages if she is found to be alive, will be emotionally charged and potentially inflame the jurors' emotions. There is, therefore, a substantial danger of under prejudice to the parties in this action. *Evidence Code* §§350, 352.

This motion will be based upon this Notice of Motion, the Memorandum of Points and Authorities contained here, the Declaration of Bruce M. Brusavich, the pleadings and records in this action, and on whatever oral or documentary evidence may be presented at the hearing of this matter.

Dated: February 23, 2017

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By: _____

Bruce M. Brusavich
Attorneys for Plaintiffs

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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS.

On December 9, 2013, Defendant Frederick S. Rosen, M.D. ("Rosen") operated on Plaintiff Jahi McMath ("Jahi") at Children's Hospital & Research Center at Oakland ("CHO") for sleep apnea. Defendant Rosen elected to perform a complex and risky surgery for sleep apnea which included the removal of her tonsils and adenoids (an adenoidtonsilectomy), the removal of the soft palate and uvula (UPPP) and a submucous resection of her bilateral turbinates. Dr. Rosen elected to operate in both of Jahi's airways at the same time and to commence the operation in the afternoon at 3:35 p.m. This left Jahi with reduced hospital staffing to help monitor her recovery from the extensive surgery.

After the surgery, at approximately 7:00 pm, Jahi was taken first to the post-anesthesia care unit ("PACU") and then to the pediatric intensive care unit ("PICU"). From the first moment that her family was given permission to see her, Jahi was coughing up blood. Jahi's mother and stepfather were told that this bleeding was "normal" and they were given paper towels to mop it up. Jahi's mother, LATASHA, received instruction from a nurse as to how to use a suction wand to suction the blood out of Jahi's mouth. LATASHA suctioned the blood for approximately 60 minutes when another nurse told her to stop suctioning because it would remove blood clots that were vital for her healing. LATASHA stopped suctioning, but Jahi continued to cough up blood while the bandages and packing in Jahi's nose were also bloody. LATASHA pleaded with the nurses to call a doctor to Jahi's bedside, but no doctor came.

Concerned about the amount of bleeding and the lack of response to it by the nurses and the failure of any doctor to attend to Jahi, LATASHA contacted her mother and Jahi's grandmother, SANDRA CHATMAN ("CHATMAN") a Kaiser surgical nurse, who arrived at CHO at approximately 10:00 pm. CHATMAN spoke with the

CHO nurses and insisted that they contact a physician.

At approximately 12:30 am on December 10, 2013, CHATMAN, while watching the monitors, noticed that there was a serious and significant desaturation of the oxygenation level of Jahi's blood, along with a precipitous drop in her heart rate. CHATMAN called out for the nursing staff and medical staff to institute a Code, and the Code was called at 12:35 am on the morning of December 10, 2013. CHATMAN observed a physician who finally came to Jahi's bedside say: "Shit, her heart stopped." The cardiopulmonary arrest and Code was documented as lasting until 3:08 a.m., or a total of 2 hours and 33 minutes.

Jahi survived the Code and was placed on a ventilator. Brain death was declared on December 14, 2014. CHO Administration pressured the family to donate her organs and disconnect her from life support.

CHO Nurses added late entry notes to Jahi's medical chart on December 15, 2013 concerning their numerous attempts to have doctors at the hospital attend to Jahi. The nurses, who failed to take steps necessary to ensure that a physician attended to Jahi. Mariko M. Holland, R.N., wrote in her initial note on 12/9/13: "MDs notified several times over course of shift that pt has large frank blood from nose and mouth..." In an Addendum written on 12/15/13 as a late entry, Ms. Holland wrote: "Team notified B. Segerstrom (resident) and A Herrara (fellow) multiple times of increasing frank blood output" and "A Herrera and J Howard (attending) notified face to face." Kathleen L. Hartman, RN wrote in an Addendum to her note: "This writer was informed there would be no immediate intervention from ENT or Surgery" and "Dr. Herrera, Dr. Howard (attending) were aware of this post op bleeding." These nurses failed to call the surgeon or go up the chain of command to the chief of nursing or the hospital administration to ensure that a physician attended Jahi as she was bleeding.

The WINKFIELD'S obtained a restraining order preventing CHO from terminating Jahi's life support. Eventually, an agreement was reached whereby

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Jahi was released to the WINKFIELDS. Alameda County issued an incomplete Death Certificate and counsel for Plaintiffs, in separate actions, have sought to rescind it.

Judge Grillo denied the petition for medical treatment for Jahi, which included a determination that Jahi "suffered brain death and was deceased as defined under Health and Safety Code sections 7180 and 7181." Judge Grillo did not preclude a different conclusion in the future as to Jahi's brain function based on new facts and a reexamination by the parties that may alter the legal rights of the parties.

The issue of whether or not Jahi currently meets the definition of brain death, separate and apart from the issue of medical malpractice, will require extensive litigation. Additionally, the Court granted Defendants' CHO and Rosen's Request for Question Certification Under Code of Civil Procedure section 166.1 for appellate hearing on two questions related to this issue. On July 12, 2016, the Appellate Court issued an Order commending the ruling of Judge Freedman, stating it would not resolve the questions at the pleading stage and thus, denied the petition for writ of mandate and other relief sought.

Plaintiffs also sought a judicial declaration from Federal Court that Jahi is alive. The Federal Court recently stayed the issue of whether Jahi is properly deemed dead or alive until a determinative ruling from this Court as to whether Jahi currently meets a brain death diagnosis under California Health and Safety Code § 7180 and 7181. (See, Order Granting In Part And Denying In Part Motions To Dismiss And Staying Case, attached hereto as "Exhibit 1"). If that issue is never addressed in this action, for example, if there is no finding of liability, the stay would be lifted and that matter would proceed.

Through this motion, Plaintiffs seek to bifurcate the issue of medical malpractice and causation of brain injury from the issue of brain death, along with the issue of damages. Regardless of the determination of brain death, there is no

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need for this complex and extended litigation if no medical malpractice that caused brain damage is found by the jury.

Defendants have each submitted CMC Statements stating that they have committed no medical negligence and intend to bring motions for summary judgment on the issue of liability. Bifurcation would allow a swift and efficient process for addressing the liability issue and determine if additional litigation is necessary. If less than all Defendants are found to have breached the standard of care which contributed to Jahi's brain damage, then only those Defendants need to participate in the remainder of the litigation.

II. PROCEDURAL HISTORY OF THIS LITIGATION

On March 3, 2015, this action was filed and assigned to the Honorable Robert Freedman. At an early Case Management Conference, Judge Freedman commented favorably upon plaintiffs' CMS statement, which suggested bifurcation. Judge Freedman thought the suggestion was meritorious and invited Plaintiffs to file the motion when his inquiry to defense counsel resulted in non-agreement.

On April 15, 2016, Plaintiffs filed the motion. However, additional DOE Defendants had been joined in the case, but had not yet appeared. Defendants Rosen and CHO objected to the motion proceeding without the appearance of the new parties to voice a position.

Plaintiffs took the motion off calendar. Plaintiffs renew this instant motion to bifurcate the liability issues from the brain function and damages issue.

III. THIS COURT SHOULD ORDER BIFURCATION OF LIABILITY AND DEATH/DAMAGES TO SERVE THE INTERESTS OF JUDICIAL ECONOMY AND EFFICIENCY, FOR CONVENIENCE OF THE PARTIES, AND TO MINIMIZE PREJUDICE.

The Court may order separate trials of any cause of action or issue pursuant to *Code of Civil Procedure* §§1048(b) and 598. *Code of Civil Procedure* §1048(b) states:

"The Court, in furtherance of convenience or to avoid prejudice, or when

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> separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action, including a cause of action asserted in a cross-complaint, or any separate issue or any number of causes of action or issues, preserving the right of trial by jury required by the Constitution or a statute of this State of the United States."

California Code of Civil Procedure §598 also grants the court the power to bifurcate this action. This section states in pertinent part:

> "The court may, when the convenience of witnesses, the ends of justice, or the economy and efficiency of handling the litigation would be promoted thereby, on motion of a party, after notice and hearing, make an order...that the trial of any issue or any part thereof shall precede the trial of any other issue or any part thereof in the case..."

Trial courts are authorized to order bifurcation of a "liability trial" and then, if necessary, a "damages trial". *Horton v. Jones* (1972) 26 Cal. App. 3d 952, 953-954, 957. A trial court may *sua sponte* order bifurcation at any time, including after the point when the trial has commenced. *Code of Civil Procedure* §598; *Buran Equip. Co. v. H&C Invest. Co.*, (1983) 142 Cal. App. 3d 338, 342. Alternatively, a trial court may regulate the order of proof in a single trial. *Evidence Code* §320. The Supreme Court stated the rationale for separating liability and damages issues over forty years ago in *Foreman v. Clark Corp.* (1971) 3 Cal;. 3d 875, 888, fn 8:

> "[A] separate trial of the liability issue was considered desirable to avoid wasting court time in cases where the plaintiff loses on the liability issue, to promote settlements where the plaintiff wins on the liability issue, and to afford a more logical presentation of the evidence, thus simplifying the issues for the jury."

An order granting bifurcation of liability and death/damages would not only minimize potential prejudice, but it would also serve the interests of judicial economy. Bifurcating trial on this issue would save the Court's time, the jury's time, and the parties' time if the jury determines that Defendants are not liable for medical malpractice. It will reduce the complexity of the case by eliminating the need for further litigation on the issue of Jahi's status as alive or dead, and will reduce the risk of unfair prejudice by ensuring that the jury bases its decision on reason rather than passion, sympathy, or the politics of Jahi's status.

It is well established that courts "have fundamental inherent equity,

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supervisory, and administrative powers, as well as the inherent power to control litigation before them. *Cottle v. Superior Court* (1992) 3 Cal. App. 4th 1367, 1377. Furthermore, this "inherent power entitles trial courts to exercise reasonable control over all proceedings connected with pending litigation in order to ensure the orderly administration of justice." *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal. 4th 953, 967 citing *Hays v. Superior Court* (1940) 16 Cal. 2d 260, 264-265.

As noted by California appellate courts, in case after case, separation of liability and damages issues often shortens and focuses trial, inasmuch as a verdict on liability "could be dispositive of the entire case." *Bly-Magee v. Budget Rent-A-Car Corp.* (1994) 24 Cal. App. 4th 318; *Plaza Tulare v. Tradewell Stores, Inc.* (1989) 207 Cal. App. 3d 522, 524.

A. <u>The Interests of Judicial Economy, Efficiency, and Convenience Require a Bifurcated Trial Given the Significant Time and Cost Required to Try the Issues of "Brain Function" and Jahi's Current Location in New Jersey.</u>

This case is ideally suited to benefit from a bifurcated trial as there are substantial time and cost savings for the court and the parties. It is logical to try liability first, so that a jury can determine whether Plaintiff can overcome the initial hurdles of liability. If the issue of whether Jahi currently meets the definition of death is litigated simultaneously with the issues of whether the Defendants negligently caused Jahi's brain injury, there is potentially a waste of the court's time. The elements of negligent conduct to determine liability for medical malpractice are the same regardless of whether this is an action for personal injury or wrongful death. However, if Plaintiffs are defeated on the liability aspect of the litigation, there is neither a wrongful death action nor a personal injury action to pursue. Simply put, bifurcating liability is judicially efficient as it possibly ends the litigation.

Furthermore, this is a case where a jury could find that some, but not all of the Defendants were negligent with respect to their care and treatment of Jahi. For example, the jury could conclude that Dr. Rosen's decision to perform such an extensive sleep apnea surgery on a child late in the afternoon was not a breach of

the standard of care, but that her follow-up care and treatment, and the failure to address her ongoing bleeding for hours post-op, did fall below the standard of care and was the cause of Jahi's coding and brain death. Recently, Dr. Rosen responded to special interrogatories wherein he contends that he was never called about complications after the surgery until 1:00 a.m. on December 10, 2013, a half an hour after the code was called.

The medical records contain multiple entries and chart entries by the nurses responsible for Jahi McMath, representing that they had been advising doctors "face-to-face" about Jahi's continuing blood loss, but could not get medical intervention for their patient. While the jurors might find this to be within the applicable standard of care and absolve the hospital of liability, they very well may find that the nurses had a duty as Jahi's patient advocate to sidestep the doctors and either call the surgeon directly or get hospital administration involved.

With respect to the doctors who were responsible for Jahi post-operatively, Fellow Alicia Herrera, M.D. attending Dr. Blake Howard and ENT specialist who was on call for Dr. Rosen, Dr. Robert Wesman, a jury could go either way as to whether or not these physicians breached the applicable standard of care in connection with their failure to care and treat Jahi. The issues of which Defendants, if any, have liability for Jahi's brain insult should be determined before the parties embark on the discovery phase and then trial of whether or not Jahi currently meets the definition of brain death.

It is anticipated that there will be an extensive proceeding, with numerous experts, regarding whether or not Jahi currently meets the criteria of brain death. Plaintiffs anticipate that issues related to whether or not Jahi meets the definition of brain death, and if found to be alive, her injuries and damages will consume months of discovery. Plaintiff and Defendants both will rely on testimony from a host of treating physicians and medical and ethical experts to address the issue of whether or not Jahi currently meets the definition of brain death.

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Medical experts from Cuba and throughout the United States with the foremost authority on brain pathology and death will need to be deposed. Defense counsel will almost certainly perform a defense medical examination in New Jersey, where Jahi is currently residing. The physicians and other medical providers currently treating Jahi will almost certainly be deposed as well, which would occur in New Jersey. Depending upon the outcome of that proceeding, a jury will be required to determine damages either for wrongful death or for personal injuries. The trial on the issue of whether Jahi meets the criteria for brain death alone will take up a significant amount of time for the court that may ultimately not be necessary.

Thus, bifurcation is proper for judicial efficiency and economy as litigation on the issue of "brain death" may not even be necessary if the jury fails to find Defendants liable for medical malpractice, saving the court and the parties time and money.

B. <u>A Bifurcated Trial is Necessary as a Joint Trial of Liability, "Brain Death," and Damages Will Prejudice The Parties Due to the Emotional Nature of Jahi's Status and Confusion of the Issues.</u>

A joint trial of liability,"brain death," and damages in this matter would be prejudicial to the parties under *Evidence Code* §352. The avoidance of prejudice is also a goal set forth in *Code of Civil Procedure* §1048(b). Jahi is a young girl who suffered very serious injuries (and Defendants' argue death) from bleeding following surgery at CHO. The events surrounding the battle to maintain Jahi on life support understandably drew media interest. Additional media attention will surround this case if the "brain function" issue is litigated prior to liability as this type of topic is heated and inflames passion in the ordinary person, making it more difficult for the jury to remain objective.

Trial of these issues will be emotional and potentially incite both sympathy and negative feelings such that it would be impossible for a jury to fairly focus on the threshold issue of liability. A new jury may be necessary as it could potentially bias members of the jury depending upon the ruling and personal belief of each jury

member.

Bifurcation will also help simplify the case for the jurors. Namely, jurors will be presented with fewer witnesses, fewer issues, and a smaller set of jury instructions.

The avoidance of prejudice would be served by an order bifurcating this trial, in that neither the Plaintiffs nor the Defendants would be unduly prejudiced by the solicitation of jury sympathy or antipathy for Plaintiff if only liability issues were first decided by the jury.

IV. PLAINTIFFS HAVE STANDING TO PURSUE A MEDICAL MALPRACTICE LIABILITY CLAIM PRIOR TO DETERMINING JAHI'S ABILITY TO PURSUE A PERSONAL INJURY CLAIM.

California Code of Civil Procedure §367 states:

> "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute."

California Code of Civil Procedure Section 367 cannot be read as imposing a federal-style standing doctrine on California's code pleading system of civil procedure. *Jasmine Networks, Inc. v. Superior Court* (Marvell Semiconductor, Inc.), 180 Cal. App. 4th 980 (2009). The fundamental inquiry is always whether the plaintiff has sufficiently pleaded a cause of action, not whether the plaintiff has some entitlement to judicial action separate from proof of the substantive merits of the claim advanced. *Id.* While the federal constitution imposes a "case or controversy" requirement on cases in federal court, no such requirement appears in the California Constitution. To the contrary, Article VI, Section 10 gives a Superior Court power to hear any "cause" brought before it. While Code of Civil Procedure 367 requires that lawsuits be brought by the real parties in interest, this means only that a lawsuit must be brought by the plaintiff who has the right to sue under the relevant substantive law.

Plaintiff filed the original complaint with proper plaintiff parties, naming both Jahi McMath, a minor, by and though her Gaurdian Ad Litem, Latasha Nailah Spears Winkfield for the possible personal injury action and Latasha Nailah Spears

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Winkfield for the possible wrongful death action. These actions may be plead in the alternative. The relative substantive law is that of a medical professional negligence claim, which will proceed forward indeterminate of the jury's ruling on the issue of whether Jahi meets the criteria of brain death.

Thus, Plaintiffs have standing to pursue a liability claim prior to a determination of "brain death" as the substantive law remains the same, a professional negligence claim.

V. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that this trial be bifurcated so that liability can be tried first. In the event the jury finds Defendants liable for medical malpractice, the parties respectfully request that the Court give them several months to perform necessary discovery so that a second trial on the issues of death and damages can take place several months later.

Dated: February 23, 2017

AGNEWBrusavich
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By: _____
Bruce M. Brusavich
Attorneys for Plaintiffs

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DECLARATION OF BRUCE M. BRUSAVICH

I Bruce M. Brusavich, declare:

1. I am an attorney licensed to practice law before all of the Courts of the State of California, and am a principal in AGNEWBrusavich, counsel of record for Plaintiffs in the matter. I have personal knowledge of the facts stated here, and if called as a witness, I would and could testify competently to them.

2. This action arises out of the purported medical malpractice of Defendants on December 9 and 10, 2013 in relation to surgery performed on the minor Plaintiff, Jahi McMath, and her follow-up care, or lack of care, resulting in excessive bleeding and cardiac arrest. Defendants have taken the position that Jahi is brain dead and therefore this case is, at most, a wrongful death case. Plaintiffs are taking the position that Jahi is alive and she is suing, through her Guardian ad Litem, for damages that will compensate her for the damages caused by the malpractice.

3. I anticipate that the liability phase of this trial may be completed in 7-10 days. The death/damages phase is anticipated to consume weeks of trial time and will require extensive depositions of numerous experts, a host of non-retained treating medical personnel and the various family members and friends of Jahi. These medical witnesses include numerous medical personnel in New Jersey who have been involved in Jahi's care and treatment, as well as medical witnesses in Cuba and Southern California. I also would expect the defense to seek multiple pre-trial hearings on the issue and continue to try and use Judge Grillo's prior finding as some sort of preclusion to a review of Jahi's current status.

4. This litigation can be handled more economically and efficiently if the issue of liability and any brain injury is bifurcated and tried first. If Defendants prevail in the bifurcated liability phase, the court and the parties will avoid the necessity of discovery and a lengthy trial on the issue of brain death and damages. If Plaintiffs prevail in the bifurcated liability phase, the likelihood of settling the action may increase, and a trial on the issues of death and damages may also be avoided. At

an early Case Management Conference in this case, Judge Freedman advised the parties that Plaintiffs' suggestion as to how to bifurcate the case made sense and, failing to get agreement, encouraged Plaintiffs to file this motion.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 23rd day of February, 2017 at Torrance, CA.

BRUCE M. BRUSAVICH
Declarant

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EXHIBIT 1

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JAHI 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

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.[1]

[1] 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.

I. BACKGROUND

A. Factual History

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

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

B. Procedural History

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

[2] Children's Hospital Oakland is now UCSF Benioff Children's Hospital Oakland.

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

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

i. Probate Action

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

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

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

ii. 2013 Federal Action

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

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

iii. 2013 Writ Petition

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

iv. Petition for Writ of Error Coram Nobis

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

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

69-6, Ex. R at 4.

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

v. Damages Action

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

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

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

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

II. DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

C. Analysis

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

i. *Rooker-Feldman* Doctrine

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

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

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

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

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

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

ii. Abstention

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

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

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

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

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

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

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

III. CONCLUSION

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

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[3] 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.

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

United States District Court
Northern District of California

Jan M Dunn

From: Dept 16, Superior Court [Dept16@alameda.courts.ca.gov]
Sent: Monday, March 06, 2017 8:15 AM
To: 'Jan M Dunn'
Subject: RE: McMath - Case No. RG15760730

I have reserved your motion for 4/27/17 in Dept. 16 at 3:00pm. Your reservation # is R-1832707. Please put the reservation # on your motion papers and be sure to lodge a courtesy copy of your moving and reply papers DIRECTLY with Dept. 16 no later than the day after filing. Courtesy copies may be left in the drop box located just outside the courtroom doors. The court CANNOT accept courtesy copies via the dept. e-mail or dept. fax. **Once your motion is filed, you may not reschedule or continue it without prior court approval. You may have to drop your motion and re-file it with a new reservation # and filing fee if you seek multiple continuances.**

NOTICE RE COURTESY COPIES AND LAW & MOTION PROCEDURE:

A courtesy copy of any opposition to this motion must be delivered DIRECTLY to Dept. 16 no later than the day after filing.

Please include the following information in your notice of motion:

Dept. 16 requires advance notice of intent to contest a tentative ruling (TR) in all law & motion matters. Your TR can be read on the internet at www.alameda.courts.ca.gov/domainweb, Calendar Information for Dept. 16, or can be heard by calling (866) 223-2244. The TR will automatically become the final order of the court unless a party does **BOTH** of the following by no later than **4 pm** on the court day before the hearing: (1) notifies the court by telephone at (510) 267-6932 or by e-mail at Dept16@alameda.courts.ca.gov, AND (2) notifies all opposing counsel or unrepresented parties by telephone or in person that the party intends to appear to contest the TR. Mere notification to CourtCall that a party intends to appear by phone does not constitute compliance with the two steps required above. A party failing to give proper advance notice will not be allowed to contest the tentative ruling on the scheduled hearing date.

SPECIAL NOTICE RE COURT REPORTERS: The court no longer provides a court reporter for civil law and motion hearings, any other hearing, or trials in civil departments. (See amended Local Rule 3.95.)

Kasha Clarke
Courtroom Clerk for the
Honorable Stephen M. Pulido
Alameda County Superior Court - Dept. 16
Contact - 510-267-6932 or X6932
QIC 20106
dept16@alameda.courts.ca.gov

From: Jan M Dunn [mailto:dunn@agnewbrusavich.com]
Sent: Friday, March 03, 2017 11:57 AM
To: Dept 16, Superior Court
Subject: McMath - Case No. RG15760730

Dear Clerk:

Plaintiffs would like to schedule a Motion to Bifurcate in the above-entitled. Please e-mail me at dunn@agnewbrusavich.com with a court date and the reservation number. Is this how we do this?

Thank you.

Jan Dunn
Secretary to
BRUCE M. BRUSAVICH

AGNEW BRUSAVICH
LAWYERS
20355 HAWTHORNE BOULEVARD . TORRANCE, CALIFORNIA 90503-2401
TELEPHONE: (310) 793-1400 FACSIMILE: (310) 793-1499 E-MAIL: ab@agnewbrusavich.com

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., 2nd Floor, Torrance, California. On March 8, 2017, I served the within document **PLAINTIFFS' NOTICE OF MOTION AND MOTION TO BIFURCATE TRIAL; MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATION OF BRUCE M. BRUSAVICH**

☐ 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:

Andrew N. Chang ESNER, CHANG & BOYER Southern California Office 234 East Colorado Boulevard Suite 975 Pasadena, CA 91101 achang@ecbappeal.com	ASSOCIATE ATTORNEY FOR PLAINTIFFS LATASHA NAILAH SPEARS WINKFIELD; MARVIN WINIKFIELD; SANDREA CHATMANH; and JAHI McMATH, a minor, by and through her Guardian ad Litem, LATASHA NAILAH SPEARS WINKFIELD (626) 535-9860 FAX (626) 535-9859
Thomas E. Still Jennifer Still HINSHAW, MARSH, STILL & HINSHAW 12901 Saratoga Avenue Saratoga, CA 95070-9998 tstill@hinshaw-law.com jstill@hinshaw-law.com	ATTORNEYS FOR FREDERICK S. ROSEN, M.D. (408) 861-6500 FAX (408) 257-6645
G. Patrick Galloway GALLOWAY, LUCCHESE, EVERSON & PICCHI 2300 Contra Costa Boulevard Suite 350 Pleasant Hill, CA 94523-2398 pgalloway@glattys.com	ATTORNEYS FOR DEFENDANT UCSF BENOIFF CHILDREN'S HOSPITAL (925) 930-9090 FAX (925) 930-9035
/// ///	

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Kenneth R. Pedroza Dana L. Stenvick COLE PEDROZA LLP 2670 Mission Street Suite 200 San Marino, CA 91108 kpedroza@colepedroza.com dstenvick@colepedroza.com	ASSOCIATE COUNSEL FOR FREDERICK S. ROSEN, M.D. and UCSF BENIOFF CHILDREN'S HOSPITAL OAKLAND (626) 431-2787 FAX (626) 431-2788

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.

AGNEW BRUSAVICH
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Executed this 8th day of March, 2017 at Torrance, California.

JAN DUNN

AGNEW BRUSAVICH
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