

Bruce M. Brusavich, State Bar No. 93578 FILED Terry S. Schneier, State Bar No. 118322 2 **AGNEW BRUSAVICH ALAMEDA COUNTY** A Professional Corporation 3 20355 Hawthorne Boulevard JUN 29 2017 Second Floor CLERK OF THE SUPERIOR COUR 4 Torrance, California 90503 (310) 793-1400 5 Andrew N. Chang, State Bar No. 84544 ESNER, CHANG & BOYER 234 East Colorado Boulevard Suite 975 7 Pasadena, CA 91101 (626) 535-9860 8 9 Attorneys for Plaintiffs 10 11 SUPERIOR COURT OF THE STATE OF CALIFORNIA 12 FOR THE COUNTY OF ALAMEDA 13 FAX FILE 14 Case No. RG15760730 LATASHA NAILAH SPEARS WINKFIELD: 15 MARVIN WINKFIELD; SANDRA CHATMAN; ASSIGNED FOR ALL PURPOSES TO: and JAHI McMATH, a minor, by and JUDGE STEPHEN PULIDO 16 through her Guardian Ad Litem, **DEPARTMENT 16** 17 LATASHA NAILAH SPEARS WINKFIELD. PLAINTIFFS' RESPONSE TO DEFENDANTS' 18 Plaintiffs, SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF 19 VS. **DEFENDANTS' MOTION FOR SUMMARY** 20 ADJUDICATION OF PLAINTIFF JAHL FREDERICK S. ROSEN, M.D.; UCSF MCMATH'S FIRST CAUSE OF ACTION FOR 21 BENIOFF CHILDREN'S HOSPITAL PERSONAL INJURIES OAKLAND (formerly Children's Hospital 22 & Research Center of Oakland); Reservation #: R-1838158 MILTON McMATH, a nominal defendant. 23 and DOES 1 THROUGH 100, Date: July 13, 2017 24 Time: 3:00 p.m. Defendants. Dept.: 16 25 Complaint Filed: March 3, 2015 26 Trial Date: None Set 27 28

DEFENDANTS' SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS - CASE NO. RG15760730 -1

1	Plaintiffs submit the following respo	nse to Defendants' statement of	
2	undisputed material facts in connection with their Motion for Summary		
3	Adjudication:		
4	DEFENDANTS' UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	PLAINTIFFS' RESPONSE AND SUPPORTING EVIDENCE	
5			
6 7	ISSUE 1: In December 2013, McMath Standards for Brain Death a Deceased Under California	Fulfilled the Accepted Medical and Was Appropriately Pronounced Law – Disputed, see below.	
8 9	A. On March 3, 2015, Plaintiffs F That Includes a First Cause o Jahi McMath	iled the Instant Medical Malpractice Suit, f Action for Personal Injuries on Behalf of	
10 11 12 13 14 15 16 17 18 19 20	Standards or Brain Death and California Law 2. The "accepted medical standards" for the determination of brain death in children such as McMath are set forth in the Guidelines for the Determination of Brain Death in Infants and Children: An	1. Undisputed. Math Met the Accepted Medical d Was Legally Deceased Under 2. Undisputed.	
21 22 23 24 25 26 27	Update of the 1987 Task Force Recommendation ("Guidelines"). • Declaration of Thomas A. Nakagawa, M.D., ¶¶ 7-9 ("Nakagawa Decl."); • Guidelines, Nakagawa Decl., Ex. B; • Declaration of Sanford Schneider, M.D., ¶¶ 6-7. ("Schneider Decl."); • Jahi McMath's Supplemental Response to Dr. Rosen's Request for Admission No. 32, ¶ 2 and Ex. A to Declaration of Jennifer Still, Esq. ("Still		
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1	Decl.");	<u> </u>	
2	• Still Decl.,¶ 2; and		
3	Testimony of Paul Fisher, M.D., Papartar's Transported of Proposal diagrams.		
4	Reporter's Transcript of Proceedings on 12/24/13, at 8:16 to 9:11 and 10:11 to 11:15, Ex. L to Nakagawa Decl.		
	Testimony of Robin Shanahan, M.D.,		
5	Reporter's Transcript of Proceedings on 12/24/13, at 57:1-10 and 101:4-25.		
7	3. During the evening of December 9, 2013, while in the Pediatric Intensive	3.	Undisputed.
8	Care Unit ("PICU") at UCSF Benioff		
9	Children's Hospital of Oakland ("CHO"), McMath began to bleed from the mouth and nose. At approximately 12:30 a.m.		
10	on December 10, 2013, McMath appeared to gag and stop breathing. A		į
11	code blue was initiated at approximately 12:35 a.m. on December		
12	10, 2013.		
13	 First Amended Complaint, ¶¶12-18; and 		
14	 Nakagawa Decl., ¶16(A); and 		·
15	 PICU Attending Event Note, CHO Chart, Bates Nos. 26607-26608, Ex. C to Nakagawa Decl. 		
16 17	4. During the approximate 2 hour and 33 minute code, there was considerable difficulty with oxygenation.	4.	Undisputed.
18	First Amended Complaint, ¶19.		
19	 Nakagawa Decl., ¶16(A); and 		
20	 PICU Attending Event Note, CHO Chart, Bates Nos. 26607-26608, Ex. C to Nakagawa Decl. 		
21	5. On December 11, 2013 at 2:08 a.m.,	5.	Undisputed.
22	Sharon Williams, M.D., ordered a head CT scan due to a change in McMath's		·
23	neurological status. The impression of the head CT scan, performed early in the		
24	morning on December 11, 2013, was (1) Diffuse cerebral edema and abnormal		
25	low attenuation in the basil ganglia and presumed basilar herniation, consistent		
26	with sequelae of anoxia; and (2) Global linear high attenuation within the		
27	subarachnoid spaces, basal cisterns, and along the tentorium felt to represent		
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1	pseudosubarachnoid hemorrhage on the basis of cerebral edema.		
2	Nakagawa Decl., ¶16(B);		
3	Dr. Sharon William's December 11, 2013, examination notes, CHO Chart,		
4	Bates Nos. 26606-26607, Ex. C to Nakagawa Decl.,		
5 6	 Head CT Order, CHO Chart, Bates No. 17332, Ex. C to Nakagawa Decl.; and 		
7	 Head CT results, CHO Chart, Bates No. 237, Ex.C to Nakagawa Decl. 		
8	6. An electroencephalogram ("EEG") lasting 41 minutes was performed the	6.	Undisputed.
9	morning of December 11, 2013. There was no reaction to stimulation. There was	-	
10 11	no discernable cerebral activity. No brain wave activity was seen. The EEG fulfilled the criteria for electrocerebral		
	inactivity.		
12	Nakagawa Decl., ¶16(C)		
13	EEG results by Dr. Robin Shanahan, CHO Chart, Bates Nos. 26620-26621, Ex. C to Nakagawa Decl.;		
14 15	 Dr. Robin Shanahan's testimony, Reporter's Transcript of Proceedings on 		•
16	12/24/13, at 66:5-25, and 67:1-6, Ex. L to Nakagawa Decl., and		
17 18	• Dr. Paul Fisher's Testimony, Reporter's Transcript of Proceedings on 12/24/13, at 31:1-13, Ex. L to Nakagawa's Decl.		
19	7. On December 11, 2013, a brain death evaluation was ordered for	7.	Undisputed.
20	McMath to determine whether McMath had sustained an irreversible cessation of all functions of her entire brain, including		
21	the brain stem.		
22	Nakagawa Decl., ¶16(D); and		
23	 Declaration of Robin Shanahan, M.D., dated 12/20/13, Ex. E to Nakagawa Decl. 		
24	8. On December 11, 2013, Robin	8.	Undisputed.
25	Shanahan, M.D., a board-certified pediatric neurologist at CHO, performed	J.	
2627	the first of three brain death evaluations performed on McMath at CHO. Dr. Shanahan had performed over 300 brain		
28	death examinations prior to her		
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1	evaluation of McMath. Dr. Shanahan correctly applied the accepted medical		
2	standards for evaluating brain death in children as set forth the <u>Guidelines</u> . Dr. Shanahan found there was no evidence of any cerebral or brain stem function.		
4	 Nakakawa Decl., ¶16(D) and 16(D)(1); 	E	
5	• Schneider Decl., ¶¶ 13-14;		
6	• Declaration of Robin Shanahan, M.D., filed 12/20/13, Ex. E to Nakagawa Decl.;		
7 8	• Dr. Robin Shanahan's 12/11/13 Brain Death Evaluation, CHO Chart, Bates Nos. 40-41, Ex. C to Nakagawa Decl.; and		
9	Dr. Robin Shanahan's Testimony, Reporter's Transcript of Proceedings on		
10	12/24/13, at pp. 55-57, 58:2-24, 60:13 to 68:2; and pp. 100-104, Ex. L to Nakagawa		
11	Decl.		7444
12	9. Pediatric critical care specialist Robert S. Heidersbach, M.D., the PICU	9.	Undisputed.
13	attending physician at CHO, also examined McMath the morning of		
14	December 11, 2013, to evaluate her clinical and radiographic evidence of		
15	early cerebral herniation. On exam, McMath's pupils were dilated and fixed.		
16	Dr. Heidersbach reported that McMath had likely progressed to brain death		
17	secondary to anoxic injury during the code.		
18	 Nakagawa Decl., ¶16(E); and 		
19	 Dr. Robert Heidersbach's 12/11/13 examination notes, CHO Chart, Bates Nos. 256-259, Ex. C to Nakagawa Decl. 		
20	10. McMath was re-examined by Dr.	10.	Undisputed.
21	Shanahan at approximately 9:00 a.m. on December 12, 2013, at the request of the		·
22	PICU staff. Throughout the night McMath had some spontaneous right arm jerks		
23	and some dramatic triple flexion withdrawal movements with extremity		
24	stimulation. The ICU staff wanted Dr. Shanahan to confirm that these were not		
25	of cortical origin coming from the brain, but rather spinal reflexes. On		
26	examination, McMath remained unchanged with unreactive, dilated		
27	pupils, fixed at 7mm, no spontaneous breathing and absent cough and gag		
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1	reflexes. Her blood pressure elevated	
2	during painful extremity pinching. She remained comatose with no	
3	environmental reaction. She had absent corneal reflexes. When fingernails were	
	pressed into her occiput (back of the	
4	head/skull), no spontaneous movement was elicited. She had easy to obtain	
5	deep tendon reflexes. With plantar	
6	stimulation there was a subtle triple flexion of both legs. One spontaneous	
7	arm jerk was observed without any stimulation. Dr. Shanahan reported that	
	the movements she observed during her	
8	repeat evaluation were consistent with spinal withdrawal and spinal myoclonus.	
9	Nakagawa Decl., ¶16(F);	
10	• Dr. Robin Shanahan's testimony,	
11	Reporter's Transcript of Proceedings on 12/23/13, at 68:3-15, 72:8-24, 82:6-21 and 86:12-25, Ex. L to Nakagawa Decl.;	
12	Dr. Shanahan's 12/12/13 examination	
13	notes, CHO Chart, Bates Nos. 252-253, Ex. C to Nakagawa Decl.; and	
14	Declaration of Robin Shanahan, M.D.,	
	le e	
1.5	Ex. E to Nakagawa Decl.	
15	11. In an attempt to satisfy the family's	11. Undisputed.
15 16	11. In an attempt to satisfy the family's concerns, a second EEG was ordered the morning of December 12, 2013, to	11. Undisputed.
	11. In an attempt to satisfy the family's concerns, a second EEG was ordered the morning of December 12, 2013, to demonstrate to the family that McMath's	11. Undisputed.
16	11. In an attempt to satisfy the family's concerns, a second EEG was ordered the morning of December 12, 2013, to demonstrate to the family that McMath's movements during an EEG had no cortical correlate. The second EEG,	11. Undisputed.
16 17	11. In an attempt to satisfy the family's concerns, a second EEG was ordered the morning of December 12, 2013, to demonstrate to the family that McMath's movements during an EEG had no cortical correlate. The second EEG, performed on December 12, 2013, lasted approximately thirty minutes. The	11. Undisputed.
16 17 18 19	11. In an attempt to satisfy the family's concerns, a second EEG was ordered the morning of December 12, 2013, to demonstrate to the family that McMath's movements during an EEG had no cortical correlate. The second EEG, performed on December 12, 2013, lasted approximately thirty minutes. The technician described episodes of spinal	11. Undisputed.
16 17 18 19 20	11. In an attempt to satisfy the family's concerns, a second EEG was ordered the morning of December 12, 2013, to demonstrate to the family that McMath's movements during an EEG had no cortical correlate. The second EEG, performed on December 12, 2013, lasted approximately thirty minutes. The technician described episodes of spinal movements including right arm movement, left arm tremors, and jerking.	11. Undisputed.
16 17 18 19	11. In an attempt to satisfy the family's concerns, a second EEG was ordered the morning of December 12, 2013, to demonstrate to the family that McMath's movements during an EEG had no cortical correlate. The second EEG, performed on December 12, 2013, lasted approximately thirty minutes. The technician described episodes of spinal movements including right arm	11. Undisputed.
16 17 18 19 20	11. In an attempt to satisfy the family's concerns, a second EEG was ordered the morning of December 12, 2013, to demonstrate to the family that McMath's movements during an EEG had no cortical correlate. The second EEG, performed on December 12, 2013, lasted approximately thirty minutes. The technician described episodes of spinal movements including right arm movement, left arm tremors, and jerking. None of the movements had any electrographic correlation. Auditory, photic and painful stimulation did not	11. Undisputed.
16 17 18 19 20 21	11. In an attempt to satisfy the family's concerns, a second EEG was ordered the morning of December 12, 2013, to demonstrate to the family that McMath's movements during an EEG had no cortical correlate. The second EEG, performed on December 12, 2013, lasted approximately thirty minutes. The technician described episodes of spinal movements including right arm movement, left arm tremors, and jerking. None of the movements had any electrographic correlation. Auditory, photic and painful stimulation did not change the background. There were no changes during blood pressure	11. Undisputed.
16 17 18 19 20 21 22 23	11. In an attempt to satisfy the family's concerns, a second EEG was ordered the morning of December 12, 2013, to demonstrate to the family that McMath's movements during an EEG had no cortical correlate. The second EEG, performed on December 12, 2013, lasted approximately thirty minutes. The technician described episodes of spinal movements including right arm movement, left arm tremors, and jerking. None of the movements had any electrographic correlation. Auditory, photic and painful stimulation did not change the background. There were no changes during blood pressure elevation. The EEG fulfilled the criteria for	11. Undisputed.
16 17 18 19 20 21 22 23 24	11. In an attempt to satisfy the family's concerns, a second EEG was ordered the morning of December 12, 2013, to demonstrate to the family that McMath's movements during an EEG had no cortical correlate. The second EEG, performed on December 12, 2013, lasted approximately thirty minutes. The technician described episodes of spinal movements including right arm movement, left arm tremors, and jerking. None of the movements had any electrographic correlation. Auditory, photic and painful stimulation did not change the background. There were no changes during blood pressure elevation. The EEG fulfilled the criteria for electrocerebral inactivity. Dr. Shanahan and Dr. Heidersbach confirmed that the	11. Undisputed.
16 17 18 19 20 21 22 23 24 25	11. In an attempt to satisfy the family's concerns, a second EEG was ordered the morning of December 12, 2013, to demonstrate to the family that McMath's movements during an EEG had no cortical correlate. The second EEG, performed on December 12, 2013, lasted approximately thirty minutes. The technician described episodes of spinal movements including right arm movement, left arm tremors, and jerking. None of the movements had any electrographic correlation. Auditory, photic and painful stimulation did not change the background. There were no changes during blood pressure elevation. The EEG fulfilled the criteria for electrocerebral inactivity. Dr. Shanahan and Dr. Heidersbach confirmed that the spinal movements seen during the time of the EEG were not associated with	11. Undisputed.
16 17 18 19 20 21 22 23 24	11. In an attempt to satisfy the family's concerns, a second EEG was ordered the morning of December 12, 2013, to demonstrate to the family that McMath's movements during an EEG had no cortical correlate. The second EEG, performed on December 12, 2013, lasted approximately thirty minutes. The technician described episodes of spinal movements including right arm movement, left arm tremors, and jerking. None of the movements had any electrographic correlation. Auditory, photic and painful stimulation did not change the background. There were no changes during blood pressure elevation. The EEG fulfilled the criteria for electrocerebral inactivity. Dr. Shanahan and Dr. Heidersbach confirmed that the spinal movements seen during the time of the EEG were not associated with brain function.	11. Undisputed.
16 17 18 19 20 21 22 23 24 25	11. In an attempt to satisfy the family's concerns, a second EEG was ordered the morning of December 12, 2013, to demonstrate to the family that McMath's movements during an EEG had no cortical correlate. The second EEG, performed on December 12, 2013, lasted approximately thirty minutes. The technician described episodes of spinal movements including right arm movement, left arm tremors, and jerking. None of the movements had any electrographic correlation. Auditory, photic and painful stimulation did not change the background. There were no changes during blood pressure elevation. The EEG fulfilled the criteria for electrocerebral inactivity. Dr. Shanahan and Dr. Heidersbach confirmed that the spinal movements seen during the time of the EEG were not associated with	11. Undisputed.

1	Ex. C to Nakagawa Decl.; and	
2	 CHO Supp. Chart Page Nos. 401-402, Ex. D to Nakagawa Decl. 	
3	12. During the second brain death examination conducted on McMath on	12. Undisputed.
4	December 12, 2013, attending PICU	
5	physician, Robert S. Heiderbach, M.D., applied the accepted medical standards for determining brain death in	
6 7	children and concluded that McMath met clinical criteria for brain death as set forth in the <u>Guidelines</u> .	
8	 Nakakawa Decl., ¶16(H); 	
9	• Schneider Decl., ¶¶ 13-14;	
10	 Declaration of Robert S. Heidersbach, M.D., filed 12/20/13, Ex. G to Nakagawa Decl. 	
11	Declaration of Sharon Williams, M.D., filed 12/20/13, Ex. F to Nakagawa Decl.;	
12 13	 Dr. Heidersbach's Brain Death Evaluation, CHO Chart, Bates No. 26604, Ex. C to Nakagawa Decl.; and 	
14 15	 Brain Death Summary, CHO Supp. Chart, Page Nos. 407-413, Ex. D to Nakagawa Decl. 	
16	13. Given that two brain death	13. Disputed. The brain death
17	evaluations performed a day apart by two different attending physicians	pronouncement was not appropriate,
18	documented clinical brain death, Dr. Heidersbach appropriately pronounced McMath clinically brain dead and	as Jahi McMath was never truly dead, even though she fulfilled the
19	deceased at 3:00 p.m. on December 12, 2013.	in December 2013. She exhibited no
20	• Nakagawa Decl., ¶16(I);	brain function at the time, but the cessation of at least two functions—
21	Brain Death Summary, CHO Supp. Chart, Bates No. 409, Ex. D to Nakagawa Doot: and	consciousness and hypothalamic regulation of menstruation and sexual
22	Decl.; and • Declaration of Sharon Williams, M.D.,	development–has proved not to be irreversible. Hence she represents an
23 24	filed 12/20/13, Ex. F to Nakagawa Decl.	example of a false positive (erroneous) diagnosis of brain death
25		following the Guidelines. (Shewmon Decl., para. 54.)
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	PLAINTIFFS' RESPONSE TO DEFENDANTS' SEPARATE	STATEMENT OF UNDISPUTED MATERIAL FACTS IN

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1	14. As of December 12, 2013, McMath was legally deceased under California's Uniform Determination of Death Act	14. Disputed. The brain death pronouncement was not appropriate,
3	since she was clinically found to have suffered an irreversible cessation of all	as Jahi McMath was never truly dead, even though she fulfilled the
4	functions of the entire brain, including the brainstem, by two attending	accepted medical criteria for death in December 2013. She exhibited no
5	physicians during evaluations performed more than 12 hours apart in accord with	brain function at the time, but the
6	the accepted medical standards set forth in the <u>Guidelines</u> .	cessation of at least two functions—consciousness and hypothalamic
7	Nakakawa Decl., ¶16(J);	regulation of menstruation and sexual development–has proved not to be
8	• Schneider Decl., ¶¶13-14;	irreversible. Hence she represents an
9	• <u>Guidelines</u> , p. e731, Nakagawa Decl., Ex. B,	example of a false positive (erroneous) diagnosis of brain death
10	 Declaration of Sharon Williams, M.D., filed 12/20/13, Ex. F to Nakagawa Decl.; and 	following the Guidelines. (Shewmon Decl., para. 54.)
11 12	 California Health and Safety Code sections 7180 and 7181 	
13 14	15. At a family conference on or about December 12, 2013, McMath's extended family was informed of McMath's death by Dr. Heidersbach and Sharon Williams, M.D.	15. Undisputed.
15 16	Social Worker Note, CHO Chart, Bates Nos. 231-233, Ex. C to Nakagawa Decl.	
17 18 19 20 21	16. On December 13, 2013, at second family conference, Dr. Heidersbach reiterated McMath's diagnosis of clinical brain death. McMath's mother, Latasha Winkfield ("Winkfield") requested that McMath be allowed to remain on the ventilator until relatives arrived. • Social Worker Note, CHO Chart, Bates Nos. 220-221, Ex.C to Nakagawa Decl.	16. Undisputed.
22	C. A Third EEG Performed on Dec Death	ember 17, 2013, Confirmed McMath's
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	PLAINTIFFS' RESPONSE TO DEFENDANTS' SEPARATE : SUPPORT OF DEFENDANTS' MOTION	STATEMENT OF UNDISPUTED MATERIAL FACTS IN FOR ASUMMARY ADJUDICATION

1	17. McMath demonstrated occasional movements following the declaration of death. On December 13 and 14, 2013, it	17. Disputed to the extent this implies movements by Jahi are not indicative
3	was noted that McMath was having brain-death associated spinal reflexes	that she is not brain dead. Video evidence taken since spring 2014
4	and occasional automatisms, including triple flexion of the lower extremities and	indicates, beyond any reasonable
5	brief clonic movements of unilateral upper extremities. Slight flexion at the	doubt, that the slower, more deliberate-looking non-myoclonic
6	ankle, knee and hip was elicited with touching her foot. McMath's	movements are in fact not independent of the commands, ruling
7	neurological status remained unchanged. The neurologic	out some hitherto unknown type of
8	examinations on December 13 and 14, 2013, remained consistent with brain	spinal automatism. There is clearly a causal relationship, indicating that <u>at</u>
9	death.	the times the videos were made, Jahi was in a responsive state, capable of
10	Nakagawa Decl., ¶16(K).PICU Progress Notes on 12/13/13, CHO	understanding a verbal command
11	Chart, Bates Nos. 222-225, Ex. C to Nakagawa Decl.; and	and barely capable of executing a simple motor response. (See, e.g.,
12	PICU Progress Notes on 12/14/13, CHO Chart, Bates Nos. 208-211, Ex. C to	Shewmon Decl., paras. 8-25.)
13	Nakagawa Decl.	
14	18. On December 16, 2013, McMath's family was informed that mechanical	18. Undisputed.
15	support would be withdrawn on December 17, 2013, and the coroner	
16	would remove McMath from the hospital.	
17	 PICU Progress Notes on 12/16/13, CHO Chart, Bates Nos. 181-184, Ex. C to 	
18	Nakagawa Decl.	
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	PLAINTIFFS' RESPONSE TO DEFENDANTS' SEPARATE	STATEMENT OF LINDISPLIED MATERIAL FACTS IN

1	19. McMath continued to exhibit final reflexes. At the request of the family, on December 17, 2013, a third EEG was performed, lasting 31 minutes in duration.	19. Disputed to the extent this implies movements and responses by Jahi are not indicative that she is not brain
3	McMath was unresponsive to pinch, light	dead. Video evidence taken since
4	touch and loud clapping. The EEG fulfilled the criteria for electrocerebral	spring 2014 indicates, beyond any reasonable doubt, that the slower,
5	inactivity. The family was informed that the EEG remained consistent with brain death.	more deliberate-looking non- myoclonic movements are in fact not
6	• Nakagawa Decl., ¶16(L);	independent of the commands, ruling
7	EEG Results on 12/17/13, CHO Chart,	out some hitherto unknown type of spinal automatism. There is clearly a
8	Bates Nos. 43-44, Ex. C to Nakagawa Decl.; and	causal relationship, indicating that <u>at</u>
9	PICU Progress Notes on 12/17/13, CHO Chart, Bates Nos. 161-163, Ex. C to	the times the videos were made, Jahi was in a responsive state, capable of
10	Nakagawa Decl.	understanding a verbal command and barely capable of executing a
11		simple motor response. (See, e.g.,
12	20. On December 17, 2013, CHO	Shewmon Decl., paras. 8-25.)
13	arranged for a review of the EEG's and head CT scan with Dr. Jean Hayward, a	20. Undisputed.
14	pediatric neurologist at Kaiser Permanente Oakland. Dr. Hayward	
15	spoke with the family and Winkfield's	
16	attorney, Christopher Dolan, via a conference call to confirm the findings were consistent with irreversible brain	
17	injury and brain death.	
18	Dr. Hayward encouraged the family to meet with the PICU team to decide on a	
19	day and time to let McMath pass on.	
20	 Nakagawa Decl., ¶16(M); PICU Progress Notes on 12/17/13, CHO 	
21	Chart, Bates Nos. 161-163, Ex. C to Nakagawa Decl.; and	
22	Dr. Jean Hayward's progress note dated 12/17/13, Kaiser Permanente	
23	Oakland Chart, p. 5, Ex. H to Nakagawa Decl.	
24	21. On or about December 17, 2013,	21. Undisputed.
25	McMath's family and their attorney met with the local news media and provided	
26	interviews. • Social Worker Note, CHO Chart, Bates	
27	Nos. 175-176, Ex. C to Nakagawa Decl.;	
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1	and	
2	• News articles published on 12/17/13 and 12/18/13, ¶ 9 and Ex. E to Still Decl.	
3		ngs to Contest McMath's Removal from
4	Artificial Support; Winkfield All Her Heart Was Still Beating And	eged McMath Was Not Dead Because d She Reacted to Touch
5	22. On December 20, 2013, Winkfield	22. Undisputed.
6	filed a Petition for Temporary Restraining Order/Order Authorizing Medical Treatment and Authorizing Petition to	
7	Give Consent to Medical Treatment and	
8	Order to Show Cause Why Permanent Injunction Should Not be Granted as to	
9	the Same, pursuant to Probate Code sections 3200 et seq., and 4600 et seq.,	
10	Winkfield v. Childrens Hospital Oakland, et al, Alameda County Superior Court, Case No. RP13-707598.	
11	 Petition filed 12/20/13, Ex.1 to Request 	
12	for Judicial Notice.	
13	23. On December 20, 2013, Winkfield filed a Declaration in support of her	23. Undisputed.
14	probate petition challenging McMath's withdrawal from mechanical support,	
15	wherein she expressed her belief that McMath was not dead because her	
16	heart was beating and she reacted to touch.	
17	Declaration of Latasha Winkfield,¶ 9, Ex. 2 to Request for Judicial Notice.	
18		formed on December 23, 2013, by the
19	Court- Appoin Paul Fisher, M.D., Confirmed	ted Independent Pediatric Neurologist, McMath's Death
20	24. On December 23, 2013, Judge Evelio Grillo appointed Paul Fisher, M.D.,	24. Undisputed.
21	as the court's independent physician to conduct a brain death evaluation to	
22	determine whether McMath was brain-	
23	dead within the meaning of California law.	
24	Grillo Order filed 12/23/13, Ex. 3 to Request for Judicial Notice.	
25	25. Dr. Fisher was qualified to make a	25. Undisputed.
26	determination of whether there was cessation of all functions of the entire	
27	brain, including the brain stem of McMath on December 23, 2013. Dr.	
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PLAINTIFFS' RESPONSE TO DEFENDANTS' SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF DEFENDANTS' MOTION FOR ASUMMARY ADJUDICATION

1 2	Fisher had performed approximately 100 brain death evaluations prior to seeing McMath.	·
3	McMath's Supplemental Response to Dr. Rosen's Request for Admission No. 28, Exhibits A and B to Still Decl.;	
4 5	Dr. Paul Fisher's Curriculum Vitae, Ex. 4 to Request for Judicial Notice; and	
6 7	• Dr. Paul Fisher's Testimony, Reporter's Transcript of Proceedings on 12/24/13, at 11:4-9 and 29:23-25, Ex. L to Nakagawa Decl.	
8	26. In the afternoon on December 23, 2013, Dr. Fisher performed a brain death	26. Disputed to the extent it implies Jahi McMath presently fulfills the
9	evaluation pursuant to the accepted medical standards set forth in the	Guidelines), as there is no question
10	Guidelines. Dr. Fisher's found that McMath fulfilled each of the neurologic	that Jahi presently does not, for the single reason that the first of the
11	examination criteria for brain death. All of McMath's cerebral and brainstem	"three cardinal findings in brain
12	reflexes were absent. She had no brainstem and no cerebral function.	death" –coma, absence of brainstem reflexes, and apnea–is not fulfilled.
13 14	During the apnea testing, there was no respiratory effort when taken off the ventilator for nine minutes.	Rather, she is intermittently responsive, placing her in the category of
15	Nakakawa Decl., ¶16(N);	"minimally conscious state." (See Shewmon Decl., paras. 6, 8-56.)
	• Schneider Decl., ¶¶13-14, 17;	grid William Book, parast o, o oo.,
16 17 18	• Dr. Fisher's 12/23/13 Brain Death Evaluation notes and Check List filed 12/26/13, Ex. 5 to Request for Judicial Notice, and Ex. I to Nakagawa Decl.;	
19	Dr. Paul Fisher's Testimony, Reporter's Transcript of Proceedings on 12/24/13, at 20.8.	
20	pp. 8 -31; and 49:10-14, Ex. L to Nakagawa	
21	Decl.;	
22	 Amended Order, filed 1/2/14, 6:22-7:1, Ex. 6 to Request for Judicial Notice; and 	
23	 Stipulation by Winkfield's attorney Chris Dolan, Reporter's Transcript of 	
24 25	Proceedings on 12/24/13, at 36:22 to 37:1, and 38:3-12, Ex. L to Nakagawa Decl.	
26	27. Present during Dr. Fisher's	27. Undisputed.
27	evaluation, were Winkfield's attorney, Chris Dolan, and McMath's grandmother, plaintiff Sandra Chatman.	
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1 2	Reporter's Transcript of Proceedings on 12/14/13, at 16:1-8, Ex. L to Nakagawa Decl.	
3	28. Dr. Fisher's found that McMath met the neurologic examination criteria for	28. Disputed to the extent it implies
4	brain death. He determined that McMath's cerebral and brainstem	Jahi McMath presently fulfills the Guidelines), as there is no question
5	reflexes were absent. She had no brainstem or cerebral function. During	that Jahi presently does <i>not</i> , for the single reason that the first of the
6	apnea testing, there was no respiratory effort when taken off the ventilator for nine minutes.	"three cardinal findings in brain death" –coma, absence of brainstem
7	Nakagawa Decl., ¶16(N);	reflexes, and apnea-is not fulfilled.
8	• Schneider Decl., ¶¶13-14, 17;	Rather, she is intermittently responsive, placing her in the category of
9	• Dr. Fisher's 12/23/13 Brain Death	"minimally conscious state." (See
10	Evaluation notes and Check List, Ex. 5 to Request for Judicial Notice, and Ex. 1 to Nakagawa Decl.; and	Shewmon Decl., paras. 6, 8-56.)
11	Dr. Paul Fisher's Testimony, Reporter's	
12 13	Transcript of Proceedings on 12/24/13, at pp.16-27; 39:8 to 40:1; 49:1-9, Ex. L to Nakagawa Decl.	
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	PLAINTIFFS' RESPONSE TO DEFENDANTS' SEPARATE S	STATEMENT OF UNDISPUTED MATERIAL FACTS IN

1	29. Dr. Fisher's brain death evaluation	29. Disputed to the extent it implies
2	exceeded the minimum requirements to determine whether a child has suffered	Jahi McMath presently fulfills the
3	brain death. In addition to the required	Guidelines), as there is no question
	clinical examination and apnea testing, Dr. Fisher ordered a repeat EEG and a	that Jahi presently does <i>not</i> , for the single reason that the first of the
4	radionuclide cerebral blood flow study,	"three cardinal findings in brain
5	both of which are recognized by the Guidelines as appropriate ancillary	death" –coma, absence of brainstem
,	studies.	reflexes, and apnea-is not fulfilled.
6	Nakagawa Decl., ¶16(O);	Rather, she is intermittently responsive,
7	• Schneider Decl., ¶¶ 13-14, 17(d);	placing her in the category of "minimally conscious state." (See
8	Dr. Fisher's letter and Brain Death	Shewmon Decl., paras. 6, 8-56.) Also.
9	Evaluation notes and Check List, Ex. 5 to Request for Judicial Notice, and Ex. 1 to	tests on Jahi performed over the past
7	Nakagawa Decl.;	several years also show that Jahi's
10	Dr. Paul Fisher's Testimony, Reporter's	brain had (and presumably still has) a
11	Transcript of Proceedings on 12/24/13, at 27:3-22, 40:9-12, 41:3-21, 42:3-25 and	surprising amount of preserved structure for a brain that was
	43:1-4, Ex. L to Nakagawa Decl.; and	supposedly totally destroyed many
12	• <u>Guidelines</u> , p. e728, Ex. B to Nakagawa	months previously. Dr. Shewmon
13	Decl.	emphatically disagrees with the
14		defense physicians' claim that the
		tests performed since December 2013 are not accepted under the
15		Guidelines. The tests were not done in
16		order to "determin[e] brain death" or
17		to "substitute for the accepted
17		medical standards," but to evaluate
18		the structure and electrophysiological functioning of Jahi's brain many
19		months after the uncontroverted
20		diagnosis of brain death according to
20		the Guidelines. The MRI scan on
21		September 26, 2014 revealed a
22		surprising extent of relatively preserved brain tissue (albeit with
23		abnormal signal properties). This
24		explains that in December 2013 when Jahi was diagnosed brain dead, <u>the</u>
∠4		lack of brain function was due more
25		to low rather than absent blood flow
26		low enough to abolish neuronal
27		function but not low enough to cause necrosis (tissue destruction) in much
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28	14	

1		of the brain. This range of cerebral
2		blood flow is called the "ischemic
		penumbra." As intracranial blood flow
3		decreases from normal to zero during the pathophysiological vicious cycle
4		leading to brain death, it necessarily
5		passes through a stage of global
		ischemic penumbra. (CITE TO
6		SHEWMON 32) If the brain's
7		nonfunction is due to ischemic
0		penumbra, <u>all elements of the</u> <u>standard diagnostic Guidelines will be</u>
8	·	fulfilled, but there is still the potential
9		for recovery of function because the
10		brain tissue is still viable; therefore, the
		<u>critical element of irreversibility in the</u>
11		statutory definition of death is not fulfilled. Jahi's MRI scan shows severe
12		damage especially to the brainstem,
13		with substantial parts of it missing
13		(after the body's removal of necrotic
14		tissue over the prior 9 months), most
15		likely due to brainstem herniation
		around the time of diagnosis. Thus, it is not at all surprising that Jahi should still
16		demonstrate absence of brainstem
17		reflexes and apnea, and that her
18		motor abilities are so severely limited.
		By contrast, consciousness, language
19		processing, and initiation of voluntary
20		movements are mediated by higher brain structures, which the MRI shows
01		to be partially preserved. The
21		brainstem is not completely
22		destroyed, and it is totally
23		conceivable that some descending
		motor pathways have survived. The somatosensory evoked response test,
24		in and of itself, certainly does not
25		establish a complete "loss of
26		neurological brain pathway function
		above this [cervical] level," [Schneider
27		declaration, p. 14, line 1] if the phrase
28		"brain pathway" is intended to mean
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1		all pathways. (Shewmon Declo., at paras. 29-35.)
3	30. Winkfield's attorney, Christopher Dolan, requested McMath undergo the	30. Undisputed.
4	radionuclide cerebral blood flow study. Dr. Fisher agreed it would be wise to	
5	perform the cerebral blood flow study on McMath because it is "beyond definitive" as a diagnostic tool of brain death and	
6	the test can help a family understand a brain death diagnosis.	
7	Nakagawa Decl., ¶16(O);	
8	Schneider Decl., ¶14;	
9	Dr. Fisher's letter and Brain Death Evaluation notes and Check List, Ex. 5 to Beguest for Judicial Notice, and Ev. Lte. Product for Judicial Notice, and Ev. Lte. The content of th	
10	Request for Judicial Notice, and Ex. I to Nakagawa Decl.; and	
11	 Dr. Paul Fisher's Testimony, Reporter's Transcript of Proceedings on 12/24/13, at 	
12	27:3-22, 41:3-12, and 42:12 to 43:4, Ex. L to	·
13	Nakagawa Decl.	
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	DI AINTIEES' DESDONSE TO DESENDANTS' SEDADATE	STATEMENT OF HANDISDIED MATERIAL PAGES

1	31. The radionuclide cerebral blood	31. Disputed to the extent it implies
2	flow study performed on December 23, 2013, confirmed the clinical diagnosis of	Jahi McMath presently fulfills the
•	brain death. Dr. Fisher was present	Guidelines), as there is no question
3	during the study. There was 40 minutes	that Jahi presently does not, for the
4	of imaging time which exceeds the standard of care. The images	single reason that the first of the
5	demonstrate a complete absence of	"three cardinal findings in brain death" –coma, absence of brainstem
5	any blood flow to the brain. There is no	reflexes, and apnea—is not fulfilled.
6	intracerebral activity, only some activity in the scalp and face. There cerebral	Rather, she is intermittently responsive,
7	blood flow study is diagnostic of	placing her in the category of
/	McMath's brain death in that is conclusively demonstrates there is no	"minimally conscious state." (See
8	blood flow going in McMath's brain. Dr.	Shewmon Decl., paras. 6, 8-56.) Also.
9	Fisher noted that McMath's CBF had a	tests on Jahi performed over the past
	"white-out in the part of the head where the brain is. Normally it would be dark	several years also show that Jahi's
10	black. In [McMath's] case it's	brain had (and presumably still has) a surprising amount of preserved
11	completely white."	structure for a brain that was
10	 Nakagawa Decl., ¶16(O)(1); 	supposedly totally destroyed many
12	Schneider Decl., ¶14;	months previously. Dr. Shewmon
13	Brain Vascular Flow A and Brain Scan	emphatically disagrees with the
14	SPECT Imaging Reports, CHO Chart, Bates No. 17369, Ex. C to Nakagawa	defense physicians' claim that the
14	Decl.; and	tests performed since December 2013
15	Dr. Paul Fisher's Testimony, Reporter's	are not accepted under the Guidelines. The tests were not done in
16	Transcript of Proceedings on 12/24/13 at	order to "determin[e] brain death" or
	24:5-9, and 27:15 to 28:14, Ex. L to Nakagawa Decl.	to "substitute for the accepted
17	riakagawa 2001.	medical standards," but to evaluate
18		the structure and electrophysiological
		functioning of Jahi's brain many
19		months after the uncontroverted
20		diagnosis of brain death according to the Guidelines. The MRI scan on
21		September 26, 2014 revealed a
21		surprising extent of relatively
22		preserved brain tissue (albeit with
23		abnormal signal properties). This
20		explains that in December 2013 when
24		Jahi was diagnosed brain dead, <u>the</u>
25		lack of brain function was due more
		to low rather than absent blood flow-
26		low enough to abolish neuronal

27

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function but not low enough to cause

necrosis (tissue destruction) in much

1.	of the brain. This range of cerebral
2	blood flow is called the "ischemic
3	penumbra." As intracranial blood flow decreases from normal to zero during
	the pathophysiological vicious cycle
4	leading to brain death, it necessarily
5	passes through a stage of global
6	ischemic penumbra. (CITE TO
-	SHEWMON 32) If the brain's nonfunction is due to ischemic
7	penumbra, <u>all elements of the</u>
8	standard diagnostic Guidelines will be
9	fulfilled, but there is still the potential
7	for recovery of function because the brain tissue is still viable; therefore, the
10	<u>critical element of irreversibility in the</u>
11	statutory definition of death is not
12	<u>fulfilled</u> . Jahi's MRI scan shows severe
12	damage especially to the brainstem,
13	with substantial parts of it missing (after the body's removal of necrotic
14	tissue over the prior 9 months), most
	likely due to brainstem herniation
15	around the time of diagnosis. Thus, it is
16	not at all surprising that Jahi should still
17	demonstrate absence of brainstem reflexes and apnea, and that her
	motor abilities are so severely limited.
18	By contrast, consciousness, language
19	processing, and initiation of voluntary
20	movements are mediated by higher
	brain structures, which the MRI shows to be partially preserved. The
21	brainstem is not completely
22	destroyed, and it is totally
23	conceivable that some descending
,	motor pathways have survived. The
24	somatosensory evoked response test, in and of itself, certainly does not
25	establish a complete "loss of
26	neurological brain pathway function
	above this [cervical] level," [Schneider
27	declaration, p. 14, line 1] if the phrase
28	"brain pathway" is intended to mean
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1	all pathways. (Shewmon Declo., at paras. 29-35.)
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	PLAINTIFFS' RESPONSE TO DEFENDANTS' SEPARATE STATEMENT OF UNDISDUTED MATERIAL FACTS IN
	L PLAINTIFFS' RESPONSE TO DEFENDANTS' SEPADATE STATEMENT OF HINDISDITED MATERIAL FACTS IN

1	32. In addition, the EEG performed on December 23, 2013, fulfills the criteria for	32. Disputed to the extent it implies Jahi McMath presently fulfills the
3	electrocerebral inactivity. Dr. Fisher was present during the test. He confirmed	Guidelines), as there is no question
4	there was no brain activity. There was no change in the recording with clapping,	that Jahi presently does <i>not</i> , for the single reason that the first of the
5	pinching the left foot, pinching the left arm or shining a light in each eye. Dr.	"three cardinal findings in brain death" –coma, absence of brainstem
6	Fisher also compared the EEG with a prior EEG, and found there was no change.	reflexes, and apnea—is not fulfilled. Rather, she is intermittently responsive,
7	 Nakagawa Decl., ¶16(O)(2); 	placing her in the category of
8	Schneider Decl., ¶ 14;	"minimally conscious state." (See Shewmon Decl., paras. 6, 8-56.) Also.
9	EEG results on 12/23/13, CHO Chart, Bates Nos. 41-42, Ex. C to Nakagawa	tests on Jahi performed over the past
10	Decl.; and	several years also show that Jahi's brain had (and presumably still has) a
:	 Dr. Paul Fisher's Testimony, Reporter's Transcript of Proceedings on 12/24/13, at 	surprising amount of preserved
11	28:17 to 29:12, and 30:10 to 31:13, Ex. L to Nakagawa Decl.	structure for a brain that was supposedly totally destroyed many
12		months previously. Dr. Shewmon
13		emphatically disagrees with the defense physicians' claim that the
14	·	tests performed since December 2013
15		are not accepted under the Guidelines. The tests were not done in
16		order to "determin[e] brain death" or
17		to "substitute for the accepted
18		medical standards," but to evaluate the structure and electrophysiological
19		functioning of Jahi's brain many
		months after the uncontroverted diagnosis of brain death according to
20		the Guidelines. The MRI scan on
21		September 26, 2014 revealed a surprising extent of relatively
22		preserved brain tissue (albeit with
23		abnormal signal properties). This explains that in December 2013 when
24		Jahi was diagnosed brain dead, <u>the</u>
25		lack of brain function was due more
26		to low rather than absent blood flow - low enough to abolish neuronal
		function but not low enough to cause
27		necrosis (tissue destruction) in much

1	of the brain. This range of cerebral
2	blood flow is called the "ischemic
	penumbra." As intracranial blood flow
3	decreases from normal to zero during
4	the pathophysiological vicious cycle
_	leading to brain death, it necessarily passes through a stage of global
5	ischemic penumbra. (CITE TO
6	SHEWMON 32) If the brain's
7	nonfunction is due to ischemic
/	penumbra, <u>all elements of the</u>
8	standard diagnostic Guidelines will be
9	fulfilled, but there is still the potential
	for recovery of function because the brain tissue is still viable; therefore, the
10	critical element of irreversibility in the
11	statutory definition of death is not
10	<u>fulfilled</u> . Jahi's MRI scan shows severe
12	damage especially to the brainstem,
13	with substantial parts of it missing
14	(after the body's removal of necrotic tissue over the prior 9 months), most
	likely due to brainstem herniation
15	around the time of diagnosis. Thus, it is
16	not at all surprising that Jahi should still
17	demonstrate absence of brainstem
17	reflexes and apnea, and that her
18	motor abilities are so severely limited. By contrast, consciousness, language
19	processing, and initiation of voluntary
	movements are mediated by higher
20	brain structures, which the MRI shows
21	to be partially preserved. The
22	brainstem is not completely destroyed, and it is totally
	conceivable that some descending
23	motor pathways have survived. The
24	somatosensory evoked response test,
	in and of itself, certainly does not
25	establish a complete "loss of
26	neurological brain pathway function above this [cervical] level," [Schneider
27	declaration, p. 14, line 1] if the phrase
	"brain pathway" is intended to mean
28	21

	all pathways. (Shewmon Declo., at
	paras. 29-35.)
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1	33. Dr. Fisher prepared a two-page report of his examination and completed the "Check List for Documentation of	33. Disputed to the extent it implies Jahi McMath presently fulfills the
3	Brain Death," found at Appendix 1 of the Guidelines. Dr. Fisher concluded that	Guidelines), as there is no question that Jahi presently does not, for the
4	McMath has a known, irreversible brain	single reason that the first of the
5	injury and complete absence of cerebral function and brainstem	"three cardinal findings in brain death" –coma, absence of brainstem
	function. He determined that McMath fulfills the accepted medical standards	reflexes, and apnea—is not fulfilled.
6	for determining brain death by professional societies and State of	Rather, she is intermittently responsive,
7	California.	placing her in the category of "minimally conscious state." (See
8	Nakagawa Decl., ¶16(P);	Shewmon Decl., paras. 6, 8-56.) Also.
9	Dr. Fisher's 12/23/13 Brain Death Evaluation notes and Check List, Ex. 5 to	tests on Jahi performed over the past several years also show that Jahi's
10	Request for Judicial Notice, and Ex. I to Nakagawa Decl.; and	brain had (and presumably still has) a
11	Dr. Paul Fisher's Testimony, Reporter's	surprising amount of preserved structure for a brain that was
12	Transcript of Proceedings on 12/24/13, at 33:14 to 34:9 and 49:3-19, Ex. L to	supposedly totally destroyed many
13	Nakagawa Decl.	months previously. Dr. Shewmon emphatically disagrees with the
		defense physicians' claim that the
14		tests performed since December 2013 are not accepted under the
15		Guidelines. The tests were not done in
16		order to "determin[e] brain death" or
17		to "substitute for the accepted medical standards," but to evaluate
18		the structure and electrophysiological
19		functioning of Jahi's brain many months after the uncontroverted
20		diagnosis of brain death according to
		the Guidelines. The MRI scan on September 26, 2014 revealed a
21		surprising extent of relatively
22		preserved brain tissue (albeit with
23		abnormal signal properties). This explains that in December 2013 when
24		Jahi was diagnosed brain dead, <u>the</u>
25		lack of brain function was due more to low rather than absent blood flow
26		low enough to abolish neuronal
27		function but not low enough to cause necrosis (tissue destruction) in much
28		The cross (18300 desired for first focil
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1	of the brain. This range of cerebral
2	blood flow is called the "ischemic
^	penumbra." As intracranial blood flow
3	decreases from normal to zero during the pathophysiological vicious cycle
4	leading to brain death, it necessarily
5	passes through a stage of global
J	ischemic penumbra. (CITE TO
6	SHEWMON 32) If the brain's
7	nonfunction is due to ischemic
^	penumbra, <u>all elements of the</u> <u>standard diagnostic Guidelines will be</u>
8	fulfilled, but there is still the potential
9	for recovery of function because the
10	brain tissue is still viable; therefore, the
	<u>critical element of irreversibility in the</u>
11	statutory definition of death is not
12	<u>fulfilled</u> . Jahi's MRI scan shows severe damage especially to the brainstem,
13	with substantial parts of it missing
13	(after the body's removal of necrotic
14	tissue over the prior 9 months), most
15	likely due to brainstem herniation
	around the time of diagnosis. Thus, it is
16	not at all surprising that Jahi should still demonstrate absence of brainstem
17	reflexes and apnea, and that her
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19	processing, and initiation of voluntary
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	motor pathways have survived. The
24	somatosensory evoked response test, in and of itself, certainly does not
25	establish a complete "loss of
2/	neurological brain pathway function
26	above this [cervical] level," [Schneider
27	declaration, p. 14, line 1] if the phrase
28	"brain pathway" is intended to mean
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2	all pathways. (Shewmon Declo., at paras. 29-35.)
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	PLAINTIFFS' RESPONSE TO DEFENDANTS' SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN

1	34. To a reasonable degree of medical certainty, McMath satisfied the medical	34. Disputed to the extent it implies Jahi McMath presently fulfills the
3	diagnostic criteria to be determined brain dead.	Guidelines), as there is no question
	 Nakagawa Decl., ¶¶16(D), 16(H), 16(O), 16(P), 18, and 20; 	that Jahi presently does not, for the single reason that the first of the
4	Schneider Decl., ¶¶ 7, 8, 14 and 19;	"three cardinal findings in brain
5	and	death" –coma, absence of brainstem reflexes, and apnea—is not fulfilled.
6	• Dr. Paul Fisher's Testimony, Reporter's Transcript of Proceedings on 12/24/13, at	Rather, she is intermittently responsive,
7	33:24-25, 34:1-9, and 49:3-19, Ex. L to Nakagawa Decl.	placing her in the category of "minimally conscious state." (See
8	Tranagawa 200/.	Shewmon Decl., paras. 6, 8-56.) Also.
9		tests on Jahi performed over the past
		several years also show that Jahi's brain had (and presumably still has) a
10		surprising amount of preserved
11		structure for a brain that was
12		supposedly totally destroyed many
12		months previously. Dr. Shewmon emphatically disagrees with the
13		defense physicians' claim that the
14		tests performed since December 2013
15		are not accepted under the
1./		Guidelines. The tests were not done in
16		order to "determin[e] brain death" or to "substitute for the accepted
17		medical standards," but to evaluate
18		the structure and electrophysiological
19		functioning of Jahi's brain many
		months after the uncontroverted diagnosis of brain death according to
20		the Guidelines. The MRI scan on
21		September 26, 2014 revealed a
22		surprising extent of relatively preserved brain tissue (albeit with
23		abnormal signal properties). This
		explains that in December 2013 when
24		Jahi was diagnosed brain dead, <u>the</u> <u>lack of brain function was due more</u>
25		to low rather than absent blood flow -
26		low enough to abolish neuronal
27		function but not low enough to cause necrosis (tissue destruction) in much
28	26	
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1	of the brain. This range of cerebral
2	blood flow is called the "ischemic
^	penumbra." As intracranial blood flow
3	decreases from normal to zero during the pathophysiological vicious cycle
4	leading to brain death, it necessarily
5	passes through a stage of global
	ischemic penumbra. (CITE TO
6	SHEWMON 32) If the brain's
7	nonfunction is due to ischemic penumbra, <u>all elements of the</u>
8	standard diagnostic Guidelines will be
_	fulfilled, but there is still the potential
9	for recovery of function because the
10	brain tissue is still viable; therefore, the
11	<u>critical element of irreversibility in the</u> <u>statutory definition of death is not</u>
	fulfilled. Jahi's MRI scan shows severe
12	damage especially to the brainstem,
13	with substantial parts of it missing
14	(after the body's removal of necrotic tissue over the prior 9 months), most
	likely due to brainstem herniation
15	around the time of diagnosis. Thus, it is
16	not at all surprising that Jahi should still
17	demonstrate absence of brainstem
	reflexes and apnea, and that her motor abilities are so severely limited.
18	By contrast, consciousness, language
19	processing, and initiation of voluntary
20	movements are mediated by higher
	brain structures, which the MRI shows to be partially preserved. The
21	brainstem is not completely
22	destroyed, and it is totally
23	conceivable that some descending
	motor pathways have survived. The somatosensory evoked response test,
24	in and of itself, certainly does not
25	establish a complete "loss of
26	neurological brain pathway function
	above this [cervical] level," [Schneider
27	declaration, p. 14, line 1] if the phrase "brain pathway" is intended to mean
28	27

1		all pathways. (Shewmon Declo., at paras. 29-35.)			
3	F. Plaintiffs Concede that McMath Fulfilled the Accepted Medical Criteria for Brain Death and the Diagnostic Criteria Were "Correctly and Rigorously Applied"				
4	35. At the hearing on December 24,	35. Undisputed.			
5	2013, Winkfield stipulated that Dr. Fisher conducted his brain death examination	33. Unaspotea.			
6 7	pursuant to the accepted medical standards, i.e, the <u>Guidelines</u> . Winkfield's attorney, Christopher Dolan, stated:				
8	"Based on my review of the guidelines, my observation of the doctor, his				
9	examination, his record findings and the worksheet, we will stipulated that				
10	[Dr. Fisher] performed his examination within the generally accepted	·			
11	medical guidelines as that is so stated within [Health and Safety Code				
12	sections 7180 and 7181.]" • Amended Order, filed 1/2/14, 6:22-7:1,				
13	Ex. 6 to Request for Judicial Notice; and				
14	Stipulation by Winkfield's attorney Chris				
15	Dolan, Reporter's Transcript of Proceedings on 12/24/13, at 36:22-25,				
16	37:1 and 38:3-12, Ex. L to Nakagawa Decl.				
17	36. Plaintiffs' expert, D. Alan Shewmon, M.D., admits that McMath fulfills the	36. Undisputed.			
18	accepted medical criteria for brain death and that the accepted criteria				
19	were "correctly and rigorously" applied. Dr. Shewmon stated <u>under penalty</u> of				
20	<u>perjury</u> in his declaration dated December 10, 2014:				
21 22	"There is "no doubt that, at the time of [McMath's] original diagnosis of brain				
23	death in December, 2013, [McMath] fulfilled the adult and pediatric				
24	diagnostic criteria [], which were correctly and rigorously applied by the				
25	several doctors who independently made that diagnosis the, and				
26	reinforced by ancillary tests: four EEGs that were all isoelectric (flat), a				
27	radionuclide scan and a SPECT scan, both of which showed no detectable				
	intracranial blood flow."				
28	28				

1 2	"Updated Declaration of D. Alan Shewmon, M.D., Concerning Jahi McMath,"at p. 3, Ex. F to Still Decl.
3	G. Judge Grillo Ruled There Was Clear and Convincing Evidence That
4	McMath Was Brain Dead and Was Legally Deceased as Defined by California Uniform Determination of Death Act.
5	37. An evidentiary hearing was conducted in the Alameda County 37. Undisputed.
6	Superior Court on December 24, 2013. Judge Grillo received testimony from Dr.
7	Robin Shanahan and Dr. Paul Fisher, and entered into evidence Dr. Shanahan's
8	and Dr. Fisher's examination notes as well as the applicable standards for
9	determining brain death, i.e., the Guidelines.
10	• Amended Order, filed 1/2/14, 6:4-18,
11	Ex. 6 to Request for Judicial Notice; and • Reporter's Transcript of Proceedings on
12	12/24/13, Ex. L to Nakagawa Decl.
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	PLAINTIFFS' RESPONSE TO DEFENDANTS' SEPARATE STATEMENT OF HINDISPHTED MATERIAL FACTS IN

1	38. Dr. Fisher and Dr. Shanahan testified	38. Disputed to the extent it implies
2	that McMath had no evidence of any cerebral or brain stem function under the	Jahi McMath presently fulfills the Guidelines), as there is no question
3	accepted medical standards, i.e,. the <u>Guidelines</u> .	that Jahi presently does not, for the
4	Dr. Robin Shanahan's Testimony,	single reason that the first of the
5	Reporter's Transcript of Proceedings on 12/24/13, at 67:7 to 68:2, Ex. L to	"three cardinal findings in brain death" –coma, absence of brainstem
6	Nakagawa Decl.; and	reflexes, and apnea-is not fulfilled.
	• Dr. Paul Fisher's Testimony, Reporter's Transcript of Proceedings on 12/24/13, at	Rather, she is intermittently responsive, placing her in the category of
7	49:1-14, Ex. L to Nakagawa Decl.	"minimally conscious state." (See
8		Shewmon Decl., paras. 6, 8-56.) Also.
9		tests on Jahi performed over the past several years also show that Jahi's
10		brain had (and presumably still has) a
11		surprising amount of preserved structure for a brain that was
		supposedly totally destroyed many
12		months previously. Dr. Shewmon
13		emphatically disagrees with the
14		defense physicians' claim that the tests performed since December 2013
15		are not accepted under the
16	·	Guidelines. The tests were not done in order to "determin[e] brain death" or
		to "substitute for the accepted
17		medical standards," but to evaluate
18	·	the structure and electrophysiological functioning of Jahi's brain many
19		months after the uncontroverted
20		diagnosis of brain death according to
21		the Guidelines. The MRI scan on September 26, 2014 revealed a
		surprising extent of relatively
22		preserved brain tissue (albeit with
23		abnormal signal properties). This explains that in December 2013 when
24		Jahi was diagnosed brain dead, <u>the</u>
25		lack of brain function was due more
		to low rather than absent blood flow - low enough to abolish neuronal
26		function but not low enough to cause
27		necrosis (tissue destruction) in much
28	30	

1		of the brain. This range of cerebral
2	,	blood flow is called the "ischemic
2		penumbra." As intracranial blood flow
3		decreases from normal to zero during the pathophysiological vicious cycle
4		leading to brain death, it necessarily
5		passes through a stage of global
		ischemic penumbra. (CITE TO
6		SHEWMON 32) If the brain's
7		nonfunction is due to ischemic
8		penumbra, <u>all elements of the</u> <u>standard diagnostic Guidelines will be</u>
0		fulfilled, but there is still the potential
9		for recovery of function because the
10		brain tissue is still viable; therefore, the
		<u>critical element of irreversibility in the</u>
11		statutory definition of death is not fulfilled. Jahi's MRI scan shows severe
12		damage especially to the brainstem,
13		with substantial parts of it missing
13		(after the body's removal of necrotic
14		tissue over the prior 9 months), most
15		likely due to brainstem herniation
17		around the time of diagnosis. Thus, it is not at all surprising that Jahi should still
16		demonstrate absence of brainstem
17		reflexes and apnea, and that her
18		motor abilities are so severely limited.
		By contrast, consciousness, language
19		processing, and initiation of voluntary movements are mediated by higher
20		brain structures, which the MRI shows
21		to be partially preserved. The
		brainstem is not completely
22		destroyed, and it is totally
23		conceivable that some descending
0.4		motor pathways have survived. The somatosensory evoked response test,
24		in and of itself, certainly does not
25		establish a complete "loss of
26		neurological brain pathway function
		above this [cervical] level," [Schneider
27		declaration, p. 14, line 1] if the phrase "brain pathway" is intended to mean
28		brain painway is interfaced to mean
	31	

1		all pathways. (Shewmon Declo., at paras. 29-35.)
3	39. Addressing Winkfield's concern that McMath's body movements were evidence that McMath was alive, Dr.	39. Disputed to the extent this implies movements and responses by Jahi
4	Shanahan testified that on December	are not indicative that she is not brain dead. Video evidence taken since
5	12, 2013, she was asked to evaluate whether McMath's body movements had a cortical origin coming from the	spring 2014 indicates, beyond any
6	brain. During the exam, Dr. Shanahan	reasonable doubt, that the slower, more deliberate-looking non-
7	observed some small muscle jerks, and when she pinched the toe, there was	myoclonic movements are in fact not
8	triple flexion withdrawal movements (the leg flexed at the knee and moved	independent of the commands, ruling out some hitherto unknown type of
9	upward). Dr. Shanahan testified that the movements were all compatible with	spinal automatism. There is clearly a
10	spinal reflex movements. Dr. Robin Shanahan's Testimony,	causal relationship, indicating that <u>at</u> <u>the times the videos were made</u> , Jahi
11	Reporter's Transcript of Proceedings on 12/24/13, at 68:3-15, 72:8-24, 82:6-21 and	was in a responsive state, capable of understanding a verbal command
12	86:12-25, Ex. L to Nakagawa Decl.	and barely capable of executing a simple motor response. (See, e.g.,
13	·	Shewmon Decl., paras. 8-25.)
14 15	40. Winkfield submitted no accepted medical evidence that McMath was not brain dead.	40. Disputed. The brain death pronouncement was not appropriate, as Jahi McMath was never truly dead,
16	 Reporter's Transcript of Proceedings on 12/24/13, Ex. L to Nakagawa Decl.; and 	even though she fulfilled the accepted medical criteria for death
17	 Amended Order, filed 1/2/14, Ex. 6 to Request for Judicial Notice. 	in December 2013. She exhibited no brain function at the time, but the
18		cessation of at least two functions— consciousness and hypothalamic
19		regulation of menstruation and sexual
20 21		development–has proved <i>not</i> to be <i>irreversible</i> . Hence she represents an
21		example of a false positive (erroneous) diagnosis of brain death
23		following the Guidelines. (Shewmon
24	41. On December 24, 2013, Judge Grillo	Decl., para. 54.)
25	issued his decision denying Winkfield's petition for medical treatment on the	41. Undisputed.
26	grounds that there was clear and convincing evidence that McMath had	
27	suffered clinical brain death and was legally deceased as defined by	
28	California's Uniform Determination of	
	32	

		•
1	Death Act. On January 2, 2014, Judge	
2	Grillo issued a detailed Amended Order denying Winkfield's Petition for Medical Treatment and finding "[McMath] had	
3	suffered brain death and was deceased as defined under Health and Safety	
4	Code sections 7180 and 7181" by "clear and convincing evidence."	
5 6	• Amended Order, filed 1/2/14, at 16:20-22, Ex. 6 to Request for Judicial Notice.	
	42. Judge Grillo's "Final Judgment	42. Undisputed.
7 8	Denying Petition for Medical Treatment" based on the January 2, 2014 Final Order, was filed on January 17, 2014.	
9	 Final Judgment, filed 1/17/14, Ex. 7 to Request for Judicial Notice. 	
10	H. A Death Certificate Was Issue	d on January 3, 2014
11	43. The Alameda County Coroner's	43. Undisputed.
12	office issued a death certificate for McMath on January 3, 2014.	
13	 Death Certificate, Ex. 18 to Request for Judicial Notice 	
14 15	44. Winkfield has not exhausted her administrative remedies or otherwise invalidated McMath's death certificate.	44. Undisputed.
16	First Amended Complaint, 8:9-19.	
17	I. McMath's Physicians at Saint Her Death	Peter's University Hospital Corroborate
18	45. On January 6, 2014, McMath was	45. Undisputed.
19	admitted to Saint Peter's University Hospital ("Saint Peter's") in New	
20	Brunswick, New Jersey, for placement of a tracheostomy for mechanical	
21	ventilation and percutaneous endoscopic gastrostomy tube	
22	placement for nutrition following brain death. These procedures were	
23	performed on January 8, 2014. Since there was no rehabilitative facility that	
24	was willing to accept McMath, due in	
25	part to the diagnosis of brain death, McMath was hospitalized in the PICU at Saint Peter's until August 25, 2014, when	
26	she was discharged to Winkfield's custody and control.	
27	 Nakagawa Decl., ¶16(Q); 	
28	33	

1	Schneider Decl., ¶15(a);		
2	• Saint Peter's Chart, pp. 5, 483-484, Ex.		
3	C to Schneider Decl., and Ex. J to Nakagawa Decl.; and		
4	Winkfield's Response to Dr. Rosen's Request for Admission Nos. 1-4, at Still		
5	Decl., ¶ 3 and Ex. B.		·
6	46. The Saint Peter's medical chart reflects that on admission on January 6,	46.	Undisputed.
7	2014, McMath was examined at length by the Chief of Pediatric Critical Care,		
8	Siva P. Jonna, M.D. Dr. Jonna reported his clinical examination was consistent		
9	with brain death. McMath was non-responsive, had no cough or gag		
10	reflex, no pupillary responses, and no spontaneous breathing.		
11	• Nakagawa Decl., ¶16(Q)(1);		
12	Schneider Decl., ¶ 15(a); and		
13	Saint Peter's Chart, pp. 483-484, Ex. C to Schneider Decl., and Ex. J to Nakagawa Decl.; and		
14	Winkfield's Response to Dr. Rosen's Requests for Admission No. 6, at Still		
15	Decl., ¶ 3 and Ex. B.		
16	47. On January 9, 2014, Dr. Jonna noted in the progress notes that he spoke with	47.	Undisputed.
17	the mother, grandmother and father about McMath's brain death and loss of		
18	brain function. On January 10, 2014, Dr. Jonna reported that he explained to J.		i
19	McMath's family that there was "no hope of brain recovery."		
20	 Schneider Decl., ¶15(a); and 		
21	 Saint Peter's Chart, p. 497-498; and 500-501, Ex. C to Schneider Decl., and Ex. 		
22	J to Nakagawa Decl.		
23			
24			
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28	34		
	PLAINTIFFS' RESPONSE TO DEFENDANTS' SEPARATE	STATE	MENT OF UNDISPUTED MATERIAL FACTS IN

48. No formal brain death evaluation per the <u>Guidelines</u> was ever performed on McMath during her hospitalization at Saint Peter's. However, the daily neurological assessments performed by the PICU team were at all times consistent with lack of brain and brainstern function. The PICU team's diagnosis was that McMath was brain dead. The records document that McMath was at all times in a coma, had no brain stem relieves, had no meaningful movement, lacked spontaneous respiration, and was fully dependent on artificial support. • Nakagawa Decl., ¶16(Q)(1); • Schneider Decl., ¶15(a); • Winkfield's Response to Dr. Rosen's Requests for Admission Nos. 5 and 9, at Still Decl., ¶3 and Ex. B; and • Saint Peter's Chart, p. 5, 483-484, 493-498, 500-501, 527, 532, 555-588, 560, 585, 608, 616-617, 712, 735, 754, 766, 778-781, 800, 821, 823, at Ex. C to Schneider Decl., and Ex. J to Nakagawa Decl. 15 16 17 18 18 19 20 21 22 23 24 25 26 27 27 28 27 28 28 27 28 28 27 28 29 20 20 21 22 23 24 25 26 27 28 28 27 28 29 20 20 21 22 23 24 25 26 27 28 28 29 20 20 21 22 23 24 25 26 27 28 28 29 29 20 20 20 21 20 21 22 23 24 25 26 27 28 28 29 29 20 20 20 21 21 22 23 24 25 26 27 28 28 29 29 20 20 20 21 20 21 22 23 24 25 26 27 28 28 29 29 20 20 20 21 21 22 23 24 25 26 27 28 28 29 29 20 20 20 21 20 21 22 23 24 25 26 27 28 28 29 29 20 20 20 21 21 22 23 24 25 26 27 28 28 29 29 20 20 20 21 20 21 22 23 24 25 26 27 28 28 29 29 20 20 20 20 20 21 20 21 20 21 20 21 22 23 24 25 26 27 28 29 29 20 20 20 20 20 21 20 21 20 21 20 21 20 21 22 23 24 25 26 27 28 29 29 20 20 20 20 21 20 20 21 20 21 20 21 20 21 20 21 20 21 20 21 20 21 20 21 20 21 20 21 20 21 20 21 20 21 20 21 21			<u> </u>
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 Winkfield's Response to Dr. Rosen's Requests for Admission Nos. 5 and 9, at Still Decl., ¶ 3 and Ex. B; and Saint Peter's Chart, p. 5, 483-484, 493-498, 500-501, 527, 532, 555-558, 560, 585, 608, 616-617, 712, 735, 754, 766, 778-781, 800, 821, 823, at Ex. C to Schneider Decl., and Ex. J to Nakagawa Decl. Is and Ex. J to Nakagawa Decl. Is and Ex. J to Nakagawa Decl. Is are not accepted under the Guidelines. The tests were not done in order to "determin[e] brain death" or to "substitute for the accepted medical standards," but to evaluate the structure and electrophysiological functioning of Jahi's brain many months after the uncontroverted diagnosis of brain death according to the Guidelines. The MRI scan on September 26, 2014 revealed a surprising extent of relatively preserved brain tissue (albeit with abnormal signal properties). This explains that in December 2013 when Jahi was diagnosed brain dead, the lack of brain function was due more to low rather than absent blood flow-low enough to abolish neuronal function but not low enough to cause 			•
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13 608, 616-617, 712, 735, 754, 766, 778-781, 800, 821, 823, at Ex. C to Schneider Decl., and Ex. J to Nakagawa Decl. 15 defense physicians' claim that the tests performed since December 2013 are not accepted under the Guidelines. The tests were not done in order to "determin[e] brain death" or to "substitute for the accepted medical standards," but to evaluate the structure and electrophysiological functioning of Jahi's brain many months after the uncontroverted diagnosis of brain death according to the Guidelines. The MRI scan on September 26, 2014 revealed a surprising extent of relatively preserved brain tissue (albeit with abnormal signal properties). This explains that in December 2013 when Jahi was diagnosed brain dead, the lack of brain function was due more to low rather than absent blood flow-low enough to abolish neuronal function but not low enough to cause	12	• Saint Peter's Chart, p. 5, 483-484, 493-	
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23 abnormal signal properties). This explains that in December 2013 when Jahi was diagnosed brain dead, the lack of brain function was due more to low rather than absent blood flow low enough to abolish neuronal function but not low enough to cause	22		
24 Explains that in December 2013 when Jahi was diagnosed brain dead, the lack of brain function was due more to low rather than absent blood flow low enough to abolish neuronal function but not low enough to cause	23		abnormal signal properties). This
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	27		_

1	of the brain. This range of cerebral
2	blood flow is called the "ischemic
	penumbra." As intracranial blood flow
3	decreases from normal to zero during
4	the pathophysiological vicious cycle leading to brain death, it necessarily
5	passes through a stage of global
5	ischemic penumbra. (CITE TO
6	SHEWMON 32) If the brain's
7	nonfunction is due to ischemic
	penumbra, <u>all elements of the</u>
8	standard diagnostic Guidelines will be fulfilled, but there is still the potential
9	for recovery of function because the
10	brain tissue is still viable; therefore, the
	<u>critical element of irreversibility in the</u>
11	statutory definition of death is not
12	<u>fulfilled</u> . Jahi's MRI scan shows severe
10	damage especially to the brainstem, with substantial parts of it missing
13	(after the body's removal of necrotic
14	tissue over the prior 9 months), most
15	likely due to brainstem herniation
	around the time of diagnosis. Thus, it is
16	not at all surprising that Jahi should still demonstrate absence of brainstem
17	reflexes and apnea, and that her
10	motor abilities are so severely limited.
18	By contrast, consciousness, language
19	processing, and initiation of voluntary
20	movements are mediated by higher
	brain structures, which the MRI shows to be partially preserved. The
21	brainstem is not completely
22	destroyed, and it is totally
23	conceivable that some descending
23	motor pathways have survived. The
24	somatosensory evoked response test,
25	in and of itself, certainly does not establish a complete "loss of
	neurological brain pathway function
26	above this [cervical] level," [Schneider
27	declaration, p. 14, line 1] if the phrase
28	"brain pathway" is intended to mean
20	36

1		all pathways. (Shewmon Declo., at paras. 29-35.)
3	49. Plaintiffs' expert, D. Alan Shewmon, M.D., admits that McMath's medical records from Saint Peter's document the	49. Undisputed.
4	absence of brainstem reflexes.	
5	"Updated Declaration of D. Alan Shewmon, M.D., Concerning Jahi Asharba "signa dayadaya ang Iba af	
6 7	McMath," signed under penalty of perjury on 12/10/14, at Page 7, Ex. F to Still Decl.	
8	50. On August 25, 2014, McMath was discharged 'home' to Ms. Winkfield's	50. Undisputed.
9	apartment in New Jersey where McMath receives continuous 24-hour a day home	·
10	nursing care. The discharge diagnosis from Saint Peter's was brain death due	·
11	to cardiopulmonary arrest and hypoxic ischemic encephalopathy. McMath's	
12	condition on discharge was that she was brain dead.	
13	 Nakagawa Decl., ¶16(Q)(2)); 	
14	Schneider Decl., ¶ 15(a); Winkfield's Response to Dr. Resente	
15	 Winkfield's Response to Dr. Rosen's Requests for Admission Nos. 3 and 14, at Still Decl., ¶ 3 and Ex. B; and 	
16 17	 Saint Peter's Chart, p. 5, at Ex. C to Schneider Decl., and Ex. J to Nakagawa Decl. 	
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28	37	
	PLAINTIFFS' RESPONSE TO DEFENDANTS' SEPARATES	STATEMENT OF UNIDISDUTED MATERIAL FACTOR

1	51. Although McMath has been in	51. Disputed to the extent it implies
2	Winkfield's custody since August 25, 2014, McMath has not been clinically	Jahi McMath presently fulfills the
3	evaluated by a physician in accord with the accepted medical standards in the	Guidelines), as there is no question that Jahi presently does not, for the
4	Guidelines since December 23, 2013, when McMath was examined by Paul	single reason that the first of the "three cardinal findings in brain
5	Fisher, M.D., at CHO.	death" –coma, absence of brainstem
6	 Nakagawa Decl., ¶¶ 16(S), 19, 20; Schneider Decl. ¶¶12, 16, 17 and 19; 	reflexes, and apnea-is not fulfilled. Rather, she is intermittently responsive,
7	Winkfield's Response to Dr. Rosen's	placing her in the category of
	Request for Admission Nos. 15 and 18, at Still Decl., ¶ 3 and Ex. B;	"minimally conscious state." (See
8	Winkfield's Response to Dr. Rosen's	Shewmon Decl., paras. 6, 8-56.) Also. tests on Jahi performed over the past
9	Requests for Admission No. 4, at Still Decl., ¶ 3 and Ex. B; and	several years also show that Jahi's
10	McMath's Supplemental Response to	brain had (and presumably still has) a surprising amount of preserved
11	Dr. Rosen's Request for Admission No. 32, at Still Decl., ¶2 and Ex. A.	structure for a brain that was
12	ar om Boon, 12 and Ex. 70	supposedly totally destroyed many months previously. Dr. Shewmon
13		emphatically disagrees with the
14		defense physicians' claim that the
15		tests performed since December 2013 are not accepted under the
		Guidelines. The tests were not done in
16		order to "determin[e] brain death" or to "substitute for the accepted
17		medical standards," but to evaluate
18		the structure and electrophysiological functioning of Jahi's brain many
19		months after the uncontroverted
20		diagnosis of brain death according to the Guidelines. The MRI scan on
21		September 26, 2014 revealed a
22		surprising extent of relatively
23		preserved brain tissue (albeit with abnormal signal properties). This
		explains that in December 2013 when
24		Jahi was diagnosed brain dead, <u>the</u> <u>lack of brain function was due more</u>
25		to low rather than absent blood flow -
26		low enough to abolish neuronal function but not low enough to cause
27		necrosis (tissue destruction) in much
28	3,8	
- 1	18	

1	of the brain. This range of cerebral
2	blood flow is called the "ischemic
	penumbra." As intracranial blood flow
3	decreases from normal to zero during
4	the pathophysiological vicious cycle
_	leading to brain death, it necessarily passes through a stage of global
5	ischemic penumbra. (CITE TO
6	SHEWMON 32) If the brain's
7	nonfunction is due to ischemic
	penumbra, <u>all elements of the</u>
8	standard diagnostic Guidelines will be
9	fulfilled, but there is still the potential
	for recovery of function because the brain tissue is still viable; therefore, the
10	<u>critical element of irreversibility in the</u>
11	statutory definition of death is not
10	<u>fulfilled</u> . Jahi's MRI scan shows severe
12	damage especially to the brainstem,
13	with substantial parts of it missing
14	(after the body's removal of necrotic tissue over the prior 9 months), most
	likely due to brainstem herniation
15	around the time of diagnosis. Thus, it is
16	not at all surprising that Jahi should still
, ,	demonstrate absence of brainstem
17	reflexes and apnea, and that her
18	motor abilities are so severely limited. By contrast, consciousness, language
19	processing, and initiation of voluntary
	movements are mediated by higher
20	brain structures, which the MRI shows
21	to be partially preserved. The
00	brainstem is not completely
22	destroyed, and it is totally
23	conceivable that some descending motor pathways have survived. The
24	somatosensory evoked response test,
	in and of itself, certainly does not
25	establish a complete "loss of
26	neurological brain pathway function
	above this [cervical] level," [Schneider
27	declaration, p. 14, line 1] if the phrase "brain pathway" is intended to mean
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	all pathways. (Shewmon Declo., o paras. 29-35.)
J. Judge Grillo's Finding of Brain Court of Law	Death Has Not Been Reversed in a
1. Winkfield did not Judgment	appeal Judge Grillo's Final Order a
52. Winkfield did not appeal Judge Grillo's Final Order and Judgment filed January 17, 2014. • Still Decl., ¶ 9.	52. Undisputed.
2. Petition for Writ of	Error Coram Nobis
53. On September 30, 2014, Winkfield initiated proceedings in the Alameda Superior Court, individually and as Guardian ad Litem for McMath, by filing a "Memorandum Regarding Court's Jurisdiction To Hear Petition For Determination That McMath Is Not Brain Dead" • Memorandum Regarding Court's Jurisdiction to Hear Petition for Determination that Jahi McMath is Not Brain Dead, filed 9/30/14, Ex. 8 to Request for Judicial Notice.	53. Undisputed.
54. On October 3, 2014, Winkfield filed a Petition for Writ of Error Coram Nobis and Memorandum Regarding Court's Jurisdiction To Hear Petition for Determination that Jahi McMath is Not Brain Dead. • Order Following Case Management Conference, Ex. 9 to Request for Judicial Notice; and	54. Undisputed.
 Writ of Error Corum Nobis and Memorandum Regarding Court's Jurisdiction To Hear Petition for Determination that Jahi McMath is Not Brain Dead, Ex.10 to Request for Judicial Notice. 	
55. In support of her Petition, Winkfield argued that she was in possession of video recordings of McMath moving in response Winkfield's commands, a brain MRI study, an EEG study, and declarations from individuals who would	55. Undisputed.
40	

1	testify McMath has brain function.		
2	Writ of Error Corum Nobis and Memorandum Regarding Court's		
3	Jurisdiction To Hear Petition for Determination that Jahi McMath is Not Brain Dead, 7:5-7; 9:13-21, Ex.10 to		
4	Request for Judicial Notice.		
5	56. Judge Grillo appointed Dr. Paul Fisher to again serve as the independent	56.	Undisputed.
6 7	medical expert. On October 6, 2014, Dr. Fisher issued a report to Judge Grillo reporting his conclusion that:		
8	"[N]one of the current materials presented in the declarations refute		
9	my [12/23/13] examination and consultation finding [], or those of		
10	several prior attending physicians who completed the same exams,		
11	that Jahi McMath met all criteria for brain death. None of the		
12	declarations provide evidence that McMath is not brain dead.		
13 14	Order, filed 10/6/14, Ex. 11 to Request for Judicial Notice; and		
15	• Fisher Report, 10/6/14, Exhibit 11 and 12 to Request for Judicial Notice	:	
16	57. After acknowledging receipt of Dr. Fisher's report, Winkfield withdrew her Petition for Writ of Error Coram Nobis.	57.	Undisputed.
1 <i>7</i> 18	• Order, filed 10/8/14, Ex. 13 to Request for Judicial Notice.		
19	58. On October 8, 2014, Christopher Dolan issued a press release advising	58.	Undisputed.
20	that he has asked Judge Grillo to postpone the hearing regarding	:	
21	McMath's status as brain dead so that the "team of international brain death		
22	experts can have time to read and react to a new statement issued by Dr. Paul Fisher." Mr. Dolan advised the		
23	media that he objected to Dr. Fisher's appointment on the grounds that Dr.		
24	Fisher had a conflict of interest and a legal bias. Mr. Dolan advised that the		
25 26	hearing would be rescheduled in the near future.		
	Press Release, Ex. G to Still Decl.		
27	59. Winkfield did not reschedule the	59.	Undisputed.
28	41		
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1 2	hearing before Judge Grillo. Nor did she seek appellate relief or otherwise challenge Judge Grillo's orders. Instead,	
3	six months later, on March 3, 2015, she filed the instant medical malpractice	
4	action, alleging a personal injury cause of action on behalf of McMath on the	
5	grounds that McMath is not brain dead. • Declaration of Jennifer Still, Esq., ¶ 11;	
6	and • Plaintiffs' Complaint.	
7	3. 2015 Federal Actio	on
8	60. On December 23, 2015, Winkfield	60. Undisputed.
9	filed a complaint for declaratory and injunctive relief in federal court alleging	
10 11	that McMath is alive, McMath v. State of California et al., U.S. District Court, Northern District of California, Case No.	
12	3:15-cv-06042. • Complaint for Declaratory and	
13	Injunctive Relief, Ex. 14 to Request for Judicial Notice.	
14	61. On December 12, 2016, the federal district court issued an order staying the	61. Undisputed.
15 16	action pending the outcome of plaintiffs' efforts to seek a determinative ruling in the instant state court action.	
17	Order, Ex. 15 to Request for Judicial Notice.	
18	ISSUE 2: No Mistakes Were Made in the December 2013, and the Diag	e Diagnosis of McMath's Brain Death in gnosis of McMath's Brain Death Was
19	Made in Accord with the Acc	epted Medical Standards
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İ	PLAINTIFFS' RESPONSE TO DEFENDANTS' SEPARATE SUPPORT OF DEFENDANTS' MOTION	STATEMENT OF UNDISPUTED MATERIAL FACTS IN FOR ASUMMARY ADJUDICATION

1	62. The medical evidence of	62. Disputed to the extent it implies
2	McMath's brain death exceeds the minimum criteria to determine brain	Jahi McMath presently fulfills the
3	death based on the <u>Guidelines</u> and what is required by law and the	Guidelines), as there is no question that Jahi presently does <i>not</i> , for the single
4	medical profession.	reason that the first of the "three
5	 Nakagawa Decl., ¶¶16(O), 18 and 19(A); and 	cardinal findings in brain death" – coma, absence of brainstem reflexes,
6	Schneider Decl. ¶13.	and apnea—is not fulfilled. Rather, she is intermittently responsive, placing her in
7		the category of "minimally conscious
8		state." (See Shewmon Decl., paras. 6, 8-56.) Also. tests on Jahi performed
		over the past several years also show
9		that Jahi's brain had (and presumably
10		still has) a surprising amount of
11		preserved structure for a brain that was supposedly totally destroyed many
12		months previously. Dr. Shewmon
12		emphatically disagrees with the
13		defense physicians' claim that the tests
14		performed since December 2013 are
		not accepted under the Guidelines. The tests were not done in order to
15	·	"determin[e] brain death" or to
16		"substitute for the accepted medical
17		standards," but to evaluate the
		structure and electrophysiological
18		functioning of Jahi's brain many months after the uncontroverted diagnosis of
19		brain death according to the
00		Guidelines. The MRI scan on September
20		26, 2014 revealed a surprising extent of
21		relatively preserved brain tissue (albeit
22		with abnormal signal properties). This explains that in December 2013 when
23		Jahi was diagnosed brain dead, the
		lack of brain function was due more to
24		low rather than absent blood flow - low
25		enough to abolish neuronal function but not low enough to cause necrosis
26		(tissue destruction) in much of the
	·	brain. This range of cerebral blood flow
27		is called the "ischemic penumbra." As
28		
	4	3

1	intracranial blood flow decreases from
2	normal to zero during the
3	pathophysiological vicious cycle leading to brain death, it necessarily
	passes through a stage of global
4	ischemic penumbra. (CITE TO
5	SHEWMON 32) If the brain's nonfunction is due to ischemic
6	penumbra, <u>all elements of the</u>
7	standard diagnostic Guidelines will be
	<u>fulfilled, but there is still the potential for</u>
8	recovery of function because the brain tissue is still viable; therefore, the critical
9	element of irreversibility in the statutory
10	<u>definition of death is not fulfilled</u> . Jahi's
11	MRI scan shows severe damage especially to the brainstem, with
	substantial parts of it missing (after the
12	body's removal of necrotic tissue over
13	the prior 9 months), most likely due to brainstem herniation around the time
14	of diagnosis. Thus, it is not at all
15	surprising that Jahi should still
	demonstrate absence of brainstem
16	reflexes and apnea, and that her motor abilities are so severely limited.
17	By contrast, consciousness, language
18	processing, and initiation of voluntary
19	movements are mediated by higher brain structures, which the MRI shows to
	be partially preserved. The brainstem is
20	not completely destroyed, and it is
21	totally conceivable that some descending motor pathways have
22	survived. The somatosensory evoked
23	response test, in and of itself, certainly
	does not establish a complete "loss of neurological brain pathway function
24	above this [cervical] level," [Schneider
25	declaration, p. 14, line 1] if the phrase
26	"brain pathway" is intended to mean all pathways. (Shewmon Declo., at paras.
27	29-35.)
28	
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	DI AINTIEES' DESPONISE TO DESENDANTS' SEDADATE STATPAFRIT OF UNDISDUTED ASSESSED TO THE

1	63. There were no diagnostic errors or mistakes made in the determination of	63. Disputed to the extent it implies
2	McMath's brain death in December 2013. McMath's brain death diagnosis	Jahi McMath presently fulfills the Guidelines), as there is no question that
3	was made in accord with the accepted medical standards.	Jahi presently does not, for the single reason that the first of the "three
4	 Nakagawa Decl., ¶¶16(D), 16(H), 	cardinal findings in brain death" –
5	16(O), 16(P), and 17; and	coma, absence of brainstem reflexes, and apnea—is not fulfilled. Rather, she is
6	Scrineider Deci. .10, 14 dnd 17.	intermittently responsive, placing her in
7		the category of "minimally conscious state." (See Shewmon Decl., paras. 6,
8		8-56.) Also. tests on Jahi performed
9		over the past several years also show that Jahi's brain had (and presumably
10		still has) a surprising amount of preserved structure for a brain that was
11		supposedly totally destroyed many
12		months previously. Dr. Shewmon emphatically disagrees with the
13		defense physicians' claim that the tests
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15		The tests were not done in order to
16		"determin[e] brain death" or to "substitute for the accepted medical
17		standards," but to evaluate the structure and electrophysiological
18		functioning of Jahi's brain many months
19		after the uncontroverted diagnosis of brain death according to the
20		Guidelines. The MRI scan on September
21		26, 2014 revealed a surprising extent of relatively preserved brain tissue (albeit
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23		explains that in December 2013 when Jahi was diagnosed brain dead, <u>the</u>
24		lack of brain function was due more to low rather than absent blood flow - low
		enough to abolish neuronal function
25		but not low enough to cause necrosis (tissue destruction) in much of the
26		brain. This range of cerebral blood flow
27		is called the "ischemic penumbra." As

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2	normal to zero during the
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	penumbra, <u>all elements of the</u> <u>standard diagnostic Guidelines will be</u>
7	fulfilled, but there is still the potential for
8	recovery of function because the brain
9	tissue is still viable; therefore, the critical
	<u>element of irreversibility in the statutory</u> <u>definition of death is not fulfilled</u> . Jahi's
10	MRI scan shows severe damage
11	especially to the brainstem, with
12	substantial parts of it missing (after the body's removal of necrotic tissue over
13	the prior 9 months), most likely due to
13	brainstem herniation around the time
14	of diagnosis. Thus, it is not at all
15	surprising that Jahi should still demonstrate absence of brainstem
16	reflexes and apnea, and that her
	motor abilities are so severely limited.
17	By contrast, consciousness, language
18	processing, and initiation of voluntary movements are mediated by higher
19	brain structures, which the MRI shows to
20	be partially preserved. The brainstem is
20	not completely destroyed, and it is
21	totally conceivable that some descending motor pathways have
22	survived. The somatosensory evoked
23	response test, in and of itself, certainly
	does not establish a complete "loss of neurological brain pathway function
24	above this [cervical] level," [Schneider
25	declaration, p. 14, line 1] if the phrase
26	"brain pathway" is intended to mean all
27	pathways. (Shewmon Declo., at paras. 29-35.)
	27 00.]
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64. In December 2013, McMath fulfilled the accepted pediatric diagnostic criteria for brain death. Dr. Shanahan, Dr. Heidersbach and Dr. Fisher appropriately applied the accepted medical standards during their brain death evaluations performed at CHO in December 2013. Nakagawa Decl., ¶¶ 16(D), 16(H), 16(O), 16(P), and 17; and Schneider Decl., ¶¶ 13, 14 and 17.	64. Disputed to the extent it implies Jahi McMath presently fulfills the Guidelines), as there is no question that Jahi presently does not, for the single reason that the first of the "three cardinal findings in brain death" – coma, absence of brainstem reflexes, and apnea—is not fulfilled. Rather, she intermittently responsive, placing her in the category of "minimally conscious state." (See Shewmon Decl., paras. 6, 8-56.) Also. tests on Jahi performed over the past several years also show that Jahi's brain had (and presumably still has) a surprising amount of preserved structure for a brain that we supposedly totally destroyed many months previously. Dr. Shewmon emphatically disagrees with the defense physicians' claim that the test performed since December 2013 are not accepted under the Guidelines. The tests were not done in order to "determin[e] brain death" or to "substitute for the accepted medical standards," but to evaluate the structure and electrophysiological functioning of Jahi's brain many month after the uncontroverted diagnosis of brain death according to the Guidelines. The MRI scan on September 26, 2014 revealed a surprising extent of relatively preserved brain tissue (albeit with abnormal signal properties). This explains that in December 2013 when Jahi was diagnosed brain dead, the lack of brain function was due more to low rather than absent blood flow—love enough to abolish neuronal function but not low enough to cause necrosis (tissue destruction) in much of the brain. This range of cerebral blood flow—love nough to abolish neuronal function but not low enough to cause necrosis (tissue destruction) in much of the brain. This range of cerebral blood flow—love nough to abolish neuronal function but not low enough to cause necrosis (tissue destruction) in much of the brain. This range of cerebral blood flow is called the "ischemic penumbra." As

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1	intracranial blood flow decreases from
2	normal to zero during the
	pathophysiological vicious cycle
3	leading to brain death, it necessarily
4	passes through a stage of global
_	ischemic penumbra. (CITE TO SHEWMON 32) If the brain's
5	nonfunction is due to ischemic
6	penumbra, <u>all elements of the</u>
_	standard diagnostic Guidelines will be
7	fulfilled, but there is still the potential for
8	recovery of function because the brain
9	tissue is still viable; therefore, the critical
1	element of irreversibility in the statutory
10	<u>definition of death is not fulfilled</u> . Jahi's MRI scan shows severe damage
11	especially to the brainstem, with
	substantial parts of it missing (after the
12	body's removal of necrotic tissue over
13	the prior 9 months), most likely due to
1.4	brainstem herniation around the time
14	of diagnosis. Thus, it is not at all
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23	response test, in and of itself, certainly
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24	neurological brain pathway function
25	above this [cervical] level," [Schneider declaration, p. 14, line 1] if the phrase
	"brain pathway" is intended to mean all
26	pathways. (Shewmon Declo., at paras.
27	29-35.)
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1	65. McMath was appropriately	65. Disputed to the extent it implies
2	pronounced deceased under California law in December 2013.	Jahi McMath presently fulfills the
3	 Nakagawa Decl., ¶¶ 16(D), 16(H), 16(O), 16(P), and 17; and 	Guidelines), as there is no question that Jahi presently does not, for the single
4	Schneider Decl. ¶¶13, 14 and 17.	reason that the first of the "three cardinal findings in brain death" –
5 6		coma, absence of brainstem reflexes, and apnea—is not fulfilled. Rather, she is
7		intermittently responsive, placing her in the category of "minimally conscious
8		state." (See Shewmon Decl., paras. 6, 8-56.) Also. tests on Jahi performed
9		over the past several years also show that Jahi's brain had (and presumably
10		still has) a surprising amount of
11	·	preserved structure for a brain that was supposedly totally destroyed many
12		months previously. Dr. Shewmon
13		emphatically disagrees with the defense physicians' claim that the tests
14		performed since December 2013 are not accepted under the Guidelines.
15		The tests were not done in order to
16		"determin[e] brain death" or to
		"substitute for the accepted medical standards," but to evaluate the
17		structure and electrophysiological
18		functioning of Jahi's brain many months
19		after the uncontroverted diagnosis of brain death according to the
20		Guidelines. The MRI scan on September
21		26, 2014 revealed a surprising extent of relatively preserved brain tissue (albeit
22		with abnormal signal properties). This explains that in December 2013 when
23		Jahi was diagnosed brain dead, the
24		lack of brain function was due more to low rather than absent blood flow - low
25		enough to abolish neuronal function
		but not low enough to cause necrosis (tissue destruction) in much of the
26		brain. This range of cerebral blood flow
27		is called the "ischemic penumbra." As
28	4	19

1	intracranial blood flow decreases from
2	normal to zero during the
3	pathophysiological vicious cycle leading to brain death, it necessarily
	passes through a stage of global
4	ischemic penumbra. (CITE TO
5	SHEWMON 32) If the brain's nonfunction is due to ischemic
6	penumbra, <u>all elements of the</u>
7	standard diagnostic Guidelines will be
	<u>fulfilled</u> , <u>but there is still the potential for</u>
8	recovery of function because the brain tissue is still viable; therefore, the critical
9	element of irreversibility in the statutory
10	<u>definition of death is not fulfilled</u> . Jahi's
	MRI scan shows severe damage
11	especially to the brainstem, with substantial parts of it missing (after the
12	body's removal of necrotic tissue over
13	the prior 9 months), most likely due to
14	brainstem herniation around the time of diagnosis. Thus, it is not at all
	surprising that Jahi should still
15	demonstrate absence of brainstem
16	reflexes and apnea, and that her
17	motor abilities are so severely limited. By contrast, consciousness, language
18	processing, and initiation of voluntary
	movements are mediated by higher
19	brain structures, which the MRI shows to be partially preserved. The brainstem is
20	not completely destroyed, and it is
21	totally conceivable that some
22	descending motor pathways have survived. The somatosensory evoked
	response test, in and of itself, certainly
23	does not establish a complete "loss of
24	neurological brain pathway function
25	above this [cervical] level," [Schneider declaration, p. 14, line 1] if the phrase
26	"brain pathway" is intended to mean all
	pathways. (Shewmon Declo., at paras.
27	29-35.)
28	50
	PLAINTIFFS' RESPONSE TO DEFENDANTS' SEPARATE STATEMENT OF LINDISPUTED MATERIAL FACTS IN
	- LEGISTICA REACTIVACITA DECENTANTA AFFARATE MATEMENT ()PHNITINETARATED RACTEDIAL EACTIVIN

1 2 3	66. Plaintiffs' expert, D. Alan Shewmon, M.D., admits that in December 2013, McMath fulfilled the accepted medical criteria for brain death and that the accepted criteria were correctly
4	applied.
5	"Updated Declaration of D. Alan Shewmon, M.D., Concerning Jahi McMath,"at p. 3, Ex. F to Still Decl.
6	•
7	ISSUE 3: The Accepted Medical Standards for Pediatric Brain Death Have Not Been Applied to McMath Since She Was Declared Deceased in December
8	2013
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	PLAINTIFFS' RESPONSE TO DEFENDANTS' SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF DEFENDANTS' MOTION FOR ASUMMARY ADJUDICATION

1	67. The only accepted neurologic criteria for assessing McMath's brain	67. Disputed to the extent it implies Jahi McMath presently fulfills the
	function is a brain death examination performed in accord with the	Guidelines), as there is no question that
3	accepted medical standards in the Guidelines.	Jahi presently does <i>not</i> , for the single reason that the first of the "three"
4	Nakagawa Decl., ¶¶6-12, and 19;	cardinal findings in brain death" –
5	• Schneider Decl., ¶¶5-8, 16, and 17;	coma, absence of brainstem reflexes,
6	and	and apnea—is not fulfilled. Rather, she is
7	Plaintiffs' Supplemental Response to Dr. Rosen's Request for Admission No.	intermittently responsive, placing her in the category of "minimally conscious
8	32, at Still Decl., ¶2 and Ex. A.	state." (See Shewmon Decl., paras. 6, 8-56.) Also. tests on Jahi performed
9		over the past several years also show
		that Jahi's brain had (and presumably
10		still has) a surprising amount of preserved structure for a brain that was
11		supposedly totally destroyed many
12		months previously. Dr. Shewmon
		emphatically disagrees with the
13		defense physicians' claim that the tests performed since December 2013 are
14		not accepted under the Guidelines.
15		The tests were not done in order to
		"determin[e] brain death" or to
16		"substitute for the accepted medical standards," but to evaluate the
17		structure and electrophysiological
18		functioning of Jahi's brain many months
		after the uncontroverted diagnosis of
19		brain death according to the
20		Guidelines. The MRI scan on September 26, 2014 revealed a surprising extent of
21		relatively preserved brain tissue (albeit
22		with abnormal signal properties). This explains that in December 2013 when
23		Jahi was diagnosed brain dead, <u>the</u>
		lack of brain function was due more to
24		low rather than absent blood flow - low enough to abolish neuronal function
25		but not low enough to cause necrosis
26		(tissue destruction) in much of the
27		brain. This range of cerebral blood flow
		is called the "ischemic penumbra." As
28	5	2

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2	normal to zero during the	
3	pathophysiological vicious cycle leading to brain death, it necessarily	
	passes through a stage of global	
4	ischemic penumbra. (CITE TO	
5	SHEWMON 32) If the brain's nonfunction is due to ischemic	
6	penumbra, <u>all elements of the</u>	
7	standard diagnostic Guidelines will be	
·	fulfilled, but there is still the potential for	
8	recovery of function because the brain tissue is still viable; therefore, the critical	
. 9	element of irreversibility in the statutory	
10	definition of death is not fulfilled. Jahi's	
11	MRI scan shows severe damage especially to the brainstem, with	
	substantial parts of it missing (after the	
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13	the prior 9 months), most likely due to brainstem herniation around the time	
14	of diagnosis. Thus, it is not at all	
15	surprising that Jahi should still	
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23	response test, in and of itself, certainly	
24	does not establish a complete "loss of neurological brain pathway function	
	above this [cervical] level," [Schneider	
25	declaration, p. 14, line 1] if the phrase	
26	"brain pathway" is intended to mean all pathways. (Shewmon Declo., at paras.	
27	29-35.)	
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	PLAINTIFFS' RESPONSE TO DEFENDANTS' SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN	

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	 68. McMath has not been clinically evaluated by a physician in accord with the accepted medical standards for determining pediatric brain death set forth in the Guidelines since she was declared deceased in December 2013. Nakagawa Decl., ¶¶16(S) and 19; Schneider Decl., ¶¶ 15-19.; and Winkfield's Response to Dr. Rosen's Request for Admission, Nos. 15, 18, and 22, at Still Decl., ¶¶ 3 and Ex. B. 	68. Disputed to the extent it implies Jahi McMath presently fulfills the Guidelines), as there is no question that Jahi presently does not, for the single reason that the first of the "three cardinal findings in brain death" – coma, absence of brainstem reflexes, and apnea—is not fulfilled. Rather, she is intermittently responsive, placing her in the category of "minimally conscious state." (See Shewmon Decl., paras. 6, 8-56.) Also. tests on Jahi performed over the past several years also show that Jahi's brain had (and presumably still has) a surprising amount of preserved structure for a brain that was supposedly totally destroyed many months previously. Dr. Shewmon emphatically disagrees with the defense physicians' claim that the tests performed since December 2013 are not accepted under the Guidelines. The tests were not done in order to "determin[e] brain death" or to "substitute for the accepted medical standards," but to evaluate the structure and electrophysiological functioning of Jahi's brain many months after the uncontroverted diagnosis of brain death according to the Guidelines. The MRI scan on September 26, 2014 revealed a surprising extent of relatively preserved brain tissue (albeit
20		Guidelines. The MRI scan on September 26, 2014 revealed a surprising extent of
21		with abnormal signal properties). This explains that in December 2013 when
23		Jahi was diagnosed brain dead, the lack of brain function was due more to
24		low rather than absent blood flow - low
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26		(tissue destruction) in much of the brain. This range of cerebral blood flow
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25	declaration, p. 14, line 1] if the phrase
26	"brain pathway" is intended to mean all pathways. (Shewmon Declo., at paras.
27	29-35.)
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1	69. No physician specializing in
2	pediatric neurology or pediatric critical care medicine with expertise
3	in the accepted medical standards for determining pediatric brain death
4	set forth in the Guidelines, who has performed a neurologic examination
5	on McMath in accord with the accepted medical standards, has
6	found that McMath <u>does not fulfill</u> the accepted neurologic criteria for
7	brain death.
8	 Winkfield's Response to Dr. Rosen's Request for Admission No. 18, at Still Decl., ¶ 3 and Ex. B.
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69. Disputed to the extent it implies Jahi McMath presently fulfills the Guidelines), as there is no question that Jahi presently does not, for the single reason that the first of the "three cardinal findings in brain death" coma, absence of brainstem reflexes. and apnea-is not fulfilled. Rather, she is intermittently responsive, placing her in the category of "minimally conscious state." (See Shewmon Decl., paras. 6, 8-56.) Also, tests on Jahi performed over the past several years also show that Jahi's brain had (and presumably still has) a surprising amount of preserved structure for a brain that was supposedly totally destroyed many months previously. Dr. Shewmon emphatically disagrees with the defense physicians' claim that the tests performed since December 2013 are not accepted under the Guidelines. The tests were not done in order to "determin[e] brain death" or to "substitute for the accepted medical standards," but to evaluate the structure and electrophysiological functioning of Jahi's brain many months after the uncontroverted diagnosis of brain death according to the Guidelines. The MRI scan on September 26, 2014 revealed a surprising extent of relatively preserved brain tissue (albeit with abnormal signal properties). This explains that in December 2013 when Jahi was diagnosed brain dead, the lack of brain function was due more to low rather than absent blood flow - low enough to abolish neuronal function but not low enough to cause necrosis (tissue destruction) in much of the brain. This range of cerebral blood flow is called the "ischemic penumbra." As

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23	response test, in and of itself, certainly
25	does not establish a complete "loss of
24	neurological brain pathway function above this [cervical] level," [Schneider
25	declaration, p. 14, line 1] if the phrase
26	"brain pathway" is intended to mean all
	pathways. (Shewmon Declo., at paras.
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	PLAINTIFFS' RESPONSE TO DEFENDANTS' SEPARATE STATEMENT OF HINDISPHTED MATERIAL FACTS IN

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3	DATED: June 29, 2017	AGNEW BRUSAVICH
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7		Andrew N. Chang Attorneys for Plaintiff
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