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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 YARET MORALES, as next friend of
12 E.L.M., the real party in interest,
13 Plaintiff,

14 v.

15 PALOMAR HEALTH; BRUCE
16 FRIEDBERG; CEP AMERICA LLC;
17 KELLY PRETORIOUS; RADY
18 CHILDREN'S HOSPITAL AND
19 HEALTH CENTER; WENDY HUNTER;
20 and CHILDREN'S SPECIALISTS OF
21 SAN DIEGO, a Medical Group, Inc.,
22 Defendants.
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Case No.: 3:14-cv-0164-GPC-MDD

ORDER:

**(1) GRANTING DEFENDANT'S
MOTION FOR PARTIAL
SUMMARY JUDGMENT AND
EXERCISING PENDENT
JURISDICTION OVER REMAINING
STATE LAW CLAIMS**

[ECF No. 127]

**(2) DENYING DEFENDANTS'
MOTION TO EXCLUDE EXPERT
TESTIMONY**

[ECF No. 128 & 129]

**(3) DENYING PLAINTIFF'S
MOTION TO EXCLUDE EXPERT
TESTIMONY**

[ECF No. 133]

1 Before the Court is Defendant Rady Children’s Hospital San Diego’s (“RCHSD”
2 or “Defendant”) motion for partial summary judgment as to Plaintiff’s claim of
3 “inadequate screening” under the Emergency Medical Treatment and Labor Act
4 (“EMTALA”). ECF No. 127. The motion has been fully briefed. Plaintiff filed an
5 opposition on September 16, 2016, ECF No. 146, and Defendant filed a reply on
6 September 20, 2016, ECF No. 148. Also before the Court is RCHSD’s motion to exclude
7 expert testimony, ECF No. 128, Defendants Children’s Specialist of San Diego’s and
8 Kelly Pretorius¹ motion to exclude expert testimony, ECF No. 129, and Plaintiff’s
9 motion to exclude expert testimony, ECF No. 133. On October 20, 2016, the Court
10 issued a tentative order granting Defendant’s motion for partial summary judgment and
11 declining to exercise pendent jurisdiction over Plaintiff’s remaining state law medical
12 malpractice claim. ECF No. 154. The Court held a hearing on the following day,
13 October 21, 2016, at which time the Court granted Defendants’ request to submit
14 supplemental briefing on the question of pendent jurisdiction. ECF No. 155. The parties
15 have fully briefed the pendent jurisdiction issue. ECF Nos. 160, 161, 162, 164.

16 After considering the parties’ submissions and arguments, and for the reasons that
17 follow, the Court **GRANTS** Defendant’s partial motion for summary judgment, the Court
18 **ASSERTS** pendent jurisdiction over Plaintiff’s remaining state law medical malpractice
19 claims, and **DENIES** Defendants’ motions to exclude expert testimony, ECF Nos. 128 &
20 129, and Plaintiff’s motion to exclude expert testimony, ECF No. 133, as moot.

21 **PROCEDURAL BACKGROUND**

22 Plaintiff filed a complaint on January 23, 2014 against Palomar Health, the owner
23 and operator of Palomar Medical Center (“PMC”); Bruce Friedberg, an emergency room
24 physician at PMC; CEP America LLC, a partnership to which Friedberg belongs; Kelly
25 Pretorius, a nurse practitioner employed by RCHSD; Wendy Hunter, a physician
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28 ¹ These Defendants have no part in the motion for partial summary judgment currently before the Court. Any reference to a single Defendant refers to RCHSD.

1 employed by RCHSD; Children’s Specialists of San Diego, a corporation of which
2 Hunter is a partner and shareholder; and RCHSD. ECF No. 1. Subject matter
3 jurisdiction was predicated upon Plaintiff’s first and second causes of action alleging that
4 PMC and RCHSD violated 42 U.S.C. § 1395dd *et seq.* (EMTALA). Plaintiff’s remaining
5 causes of action alleged medical negligence against the various defendants. *Id.*

6 Plaintiff filed a first amended complaint on June 13, 2014. ECF No. 24. On June
7 25, 2014, Defendant RCHSD filed a motion to dismiss Plaintiff’s FAC, arguing that
8 Plaintiff lacked subject matter jurisdiction to file in federal court because it had failed to
9 state sufficient facts to state an EMTALA violation. ECF No. 28. The Court denied in
10 part and granted in part RCHSD’s motion to dismiss. *See* ECF No. 48. It dismissed
11 Plaintiff’s EMTALA claim insofar as is relied on EMTALA’s “disparate treatment”
12 theory of liability, but allowed Plaintiff’s EMTALA claim based on an “inadequate
13 screening” theory of liability. *Id.*

14 Plaintiff filed a second amended complaint on September 3, 2014, adding the
15 United States Department of Health & Human Services (HHS) as a defendant. ECF No.
16 57. On March 22, 2015, the Court dismissed HHS as a party with prejudice. ECF No.
17 101. On April 25, 2016, the Court dismissed Defendant Wendy Hunter, M.D., with
18 prejudice. ECF No. 113. On September 9, 2016 the Court granted a joint motion to
19 dismiss Defendants PMC, Bruce Friedberg, M.D., and CEP America with prejudice.
20 ECF No. 139. Thus, the only remaining defendants are RCHSD, Kelly Pretorius, and
21 Children’s Specialist of San Diego.

22 **FACTUAL BACKGROUND**

23 On February 16, 2013 at 5:23 pm, E.L.M., a one year-old, arrived at RCHSD for
24 urgent care. Pl.’s Statement in Opposition to Def.’s Undisputed Facts (“PUF”) ¶ 8, ECF
25 No. 146-2 at 2-3; *see also* Def.’s Exhibit 3, ECF No. 127-3 at 25. A physician examined
26 E.L.M. and determined that she was well-nourished, well-developed, well-hydrated, had
27 no acute distress, and was non-toxic. *Id.* After the consultation, the physician concluded
28 it was possible that the child had early flu or an upper respiratory tract infection. *Id.* at

1 27; PUF ¶ 8, ECF No. 146-2 at 3. The physician prescribed E.L.M. with Tamiflu and
2 indicated that she should begin taking it as soon as possible. PUF ¶ 10, ECF No. 146-2 at
3 3.²

4 On February 17, 2013, at approximately 2:37 am, E.L.M.'s father brought her to
5 PMC's emergency department for further treatment. *Id.* ¶ 12, ECF No. 146-2 at 3; Def.'s
6 Exhibit 4, ECF No. 127-3 at 29. PMC performed a urine culture and urinalysis on
7 E.L.M., and the results came back normal. *Id.*; PUF ¶ 14, ECF No. 146-2 at 3. PMC
8 took E.L.M.'s temperature and recorded that she had a fever of 100.4 degrees. Def.'s
9 Exhibit 4, ECF No. 127-3 at 30. A physician examined E.L.M. and determined that she
10 appeared non-toxic, alert, active, had a good tone, and that she was well-hydrated. *Id.*,
11 ECF No. 127-3 at 31; PUF ¶ 13, ECF No. 146-2 at 3. The physician noted that there was
12 no clinical evidence "for an obvious focus on infection, nor any signs or symptoms to
13 suggest a serious illness, such as sepsis, pneumonia, meningitis, or urinary tract
14 infection." Def.'s Exhibit 4, ECF No. 127-3 at 33. Subsequently, the attending physician
15 determined that the patient had an acute febrile illness and sent E.L.M. home with
16 instructions to return if her condition worsened. *Id.*

17 Later that day, at approximately 7:20 pm, E.L.M.'s father again brought her to
18 RCHSD's emergency department. PUF ¶ 12, ECF No. 146-2 at 3; Def.'s Exhibit 4, ECF
19 No. 127-3 at 36. An intake triage nurse saw E.L.M. at approximately 7:25 pm. Exhibit
20 4, Report of Marleen Vermeer at ¶ 18, ECF No. 146-1 at 32. The nurse recorded that
21 E.L.M. had been vomiting, been with diarrhea, had a fever, and that she had been
22 fatigued. *Id.* Another triage nurse visited E.L.M. at approximately 8:02 pm. *Id.* ¶ 19,
23 ECF No. 146-1 at 32. This nurse again reviewed the history of E.L.M.'s condition,
24 observed her, and determined that she "had decreased activity, but was consolable,
25 distractable [sic] and did not appear listless, was breathing normally, and her abdominal
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28 ² Plaintiff has not challenged the adequacy of treatment or screening provided by RCHSD on February 16, 2013.

1 evaluation was normal.” *Id.* The second triage nurse administered E.L.M. 2mg of
2 Zofran, a drug designed to prevent nausea and vomiting. *Id.*

3 E.L.M. was subsequently attended to by nurse practitioner Kelly Pretorius. *Id.*
4 ¶ 19, ECF No. 146-2 at 4. Pretorius’ notes indicate that she spoke with E.L.M.’s father
5 and mother about their daughter’s condition. E.L.M. had had a fever since the day
6 before, with a maximum fever of 105 degrees. Kelly Pretorius Depo. at 34:18-25, ECF
7 No. 127-3 at 67. E.L.M. had been vomiting and suffering from diarrhea. *See, e.g., id.* at
8 74:6-10, ECF No. 127-3 at 80. According to her parents, she was not active, she just
9 wanted to sleep all day, and her mother had recently been hospitalized for influenza. *Id.*
10 at 41:8-13, ECF No. 127-3 at 71; Def.’s Exhibit 5, ECF No. 127-3 at 36. Pretorius also
11 spoke with E.L.M.’s parents about E.L.M.’s visit to PMC earlier that morning and the
12 fact that PMC had diagnosed E.L.M. with a virus. Def.’s Exhibit 5, ECF No. 127-3 at 37.

13 Pretorius subsequently performed a physical exam of E.L.M.’s entire body
14 including her head, ears, nose, mouth, eyes, neck, chest, skin, abdomen, cardiovascular
15 system, muscoskeletal system, and neurological system. *See* Def.’s Exhibit 5, ECF No.
16 127-3 at 38. She evaluated E.L.M.’s vital signs and found them to be normal. PUF ¶ 26,
17 ECF No. 146-2 at 4. She then evaluated E.L.M. for the “etiology of fever” and
18 determined that there was no evidence of “otitis media, sinusitis, meningitis, pneumonia,
19 or bacterial pharyngitis.” *Id.* Based on E.L.M.’s nontoxic appearance, her family history
20 of recent hospitalization for influenza, the fact that she was well-hydrated, had recently
21 had a urine test that came back negative, and the fact that she had exhibited normal signs
22 with a low-grade fever, Pretorius determined that E.L.M. likely had a virus, potentially
23 influenza. Pretorius Depo. at 40:23-41:9, ECF No. 70-71. Further, Pretorius also made a
24 number of differential diagnoses that included, viral upper-respiratory tract infection,
25 viral illness, appendicitis, ileus, constipation, gastroenteritis, obstruction, and pneumonia.
26 *Id.* At the end of her examination, Pretorius prescribed E.L.M. Zofran. PUF ¶ 31, ECF
27 No. 146-2 at 5. She recommended supportive care including fluids, antipyretics, and rest,
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1 and reviewed return precautions with E.L.M.'s parents. Def.'s Exhibit 5, ECF No. 127-3
2 at 39.

3 E.L.M. returned to RCHSD's emergency department on February 19, 2013. Pl.'s
4 Exhibit 9, ECF No. 146-1 at 56. At that time, she was diagnosed with meningitis. *Id.*
5 This suit followed.

6 LEGAL STANDARD

7 Federal Rule of Civil Procedure ("Rule") 56 empowers courts to enter summary
8 judgment on factually unsupported claims or defenses, and thereby "secure the just,
9 speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477
10 U.S. 317, 325, 327 (1986). Summary judgment is appropriate if the "pleadings,
11 depositions, answers to interrogatories, and admissions on file, together with the
12 affidavits, if any, show that there is no genuine issue as to any material fact and that the
13 moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is
14 material when it affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477
15 U.S. 242, 248 (1986).

16 The moving party bears the initial burden of demonstrating the absence of any
17 genuine issues of material fact. *Celotex*, 477 U.S. at 323. The moving party can satisfy
18 this burden by demonstrating that the nonmoving party failed to make a showing
19 sufficient to establish an element of his or her claim on which that party will bear the
20 burden of proof at trial. *Id.* at 322-23. If the moving party fails to bear the initial burden,
21 summary judgment must be denied and the court need not consider the nonmoving
22 party's evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60 (1970).

23 Once the moving party has satisfied this burden, the nonmoving party cannot rest
24 on the mere allegations or denials of his pleading, but must "go beyond the pleadings and
25 by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions
26 on file' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*,
27 477 U.S. at 324. If the non-moving party fails to make a sufficient showing of an
28 element of its case, the moving party is entitled to judgment as a matter of law. *Id.* at

1 325. “Where the record taken as a whole could not lead a rational trier of fact to find for
2 the nonmoving party, there is no ‘genuine issue for trial.’” *Matsushita Elec. Indus. Co. v.*
3 *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *First Nat’l Bank of Arizona v.*
4 *Cities Serv. Co.*, 391 U.S. 253, 289 (1968)). In making this determination, the court must
5 “view[] the evidence in the light most favorable to the nonmoving party.” *Fontana v.*
6 *Haskin*, 262 F.3d 871, 876 (9th Cir. 2001). The court does not engage in credibility
7 determinations, weighing of evidence, or drawing of legitimate inferences from the facts;
8 these functions are for the trier of fact. *Anderson*, 477 U.S. at 255.

9 DISCUSSION

10 **1. EMTALA Violation**

11 Congress passed EMTALA, 42 U.S.C. § 1395dd, in response to concerns “that
12 hospitals were dumping patients who were unable to pay for care, either by refusing to
13 provide emergency treatment to these patients, or by transferring the patients to other
14 hospitals before the patients’ conditions stabilized.” *Jackson v. East Bay Hosp.*, 246 F.3d
15 1248, 1254 (9th Cir. 2001). Accordingly, under EMTALA, hospitals have a continuing
16 duty to provide a certain level of minimum care appropriate to detect, and then treat,
17 emergency conditions. *See* 42 U.S.C. § 1395dd. Once an individual arrives at a
18 hospital’s emergency department seeking an examination or treatment for a medical
19 condition, the hospital must: 1) “provide for an appropriate medical screening
20 examination . . . to determine whether or not an emergency medical condition . . . exists”
21 and 2) if the individual has such an emergency condition, the hospital must perform
22 stabilizing treatment. *See id.* § 13955(a), (b). The term “emergency medical condition”
23 refers to a medical condition “manifesting itself by acute symptoms of sufficient severity
24 (including severe pain) such that the absence of immediate medical attention could
25 reasonably be expected to result in—(i) the placing of the health of the individual . . . in
26 serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction
27 of any bodily organ or part.” *Id.* § 1395dd(e)(1)(A).

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1 Although the statute does not define “appropriate medical screening examination,”
2 the Ninth Circuit has given meaning to the term by stating that:

3 a screening is “appropriate” within the meaning of EMTALA if it . . . provides a
4 patient with an examination comparable to the one offered to other patients
5 presenting similar symptoms, unless the examination is so cursory that it is not
6 designed to identify acute and severe symptoms that alert the physician of the need
7 for immediate medical attention to prevent serious bodily injury.

8 *Baker v. Adventist Health, Inc.*, 260 F.3d 987, 995 (9th Cir. 2001), *quoting Jackson*, 246
9 F.3d at 1256 (citations omitted). Accordingly, a hospital may breach its duties under
10 EMTALA by 1) treating a patient differently than other patients presenting similar issues
11 (the “disparate treatment” theory of liability) or 2) by conducting a screening examination
12 so lacking as to support the conclusion that it was not designed to identify acute and
13 severe symptoms (the “inadequate screening” theory of liability). *See Jackson*, 246 F.3d
14 at 1255; *see also Hoffman v. Tonnemacher*, 425 F. Supp. 2d 1120, 1131 (E.D. Cal. 2006).
15 Whether or not a screening is lacking, and therefore inappropriate, depends upon whether
16 the examination was designed to identify acute and severe symptoms that alert physicians
17 of the need for immediate medical attention. *See Eberhardt v. City of Los Angeles*, 62
18 F.3d 1253, 1257 (9th Cir. 1995). Here, the Court has already dismissed Plaintiff’s
19 EMTALA claim insofar as it relied on EMTALA’s disparate treatment theory of liability.
20 *See Order on Def. RCHSD’s Mot. to Dismiss* (ECF No. 28). Thus, the only remaining
21 question before the Court is whether or not Defendant’s screening of E.L.M. was so
22 cursory that it suggests the procedure was not designed to identify emergency conditions.

23 In order to demonstrate that RCHSD’s screening was, as a matter of law,
24 appropriate within the meaning of EMTALA, Defendant has provided the Court with a
25 copy of its EMTALA Policy and an expert report opining on the sufficiency of that
26 policy. *See Exhibit 1, RCHSD’s EMTALA Emergency Medical Treatment and Active*
27 *Labor Policy*, CPM 4-38, ECF No. 127-4 at 4-30; *Exhibit 1, Decl. of Vincent Wang,*
28 *M.D.*, ECF No. 127-5 at 9-10. After reviewing Defendant’s treatment of Plaintiff, Dr.

1 Wang³ concluded that Plaintiff did not have an emergency medical condition on February
2 17, 2013. *See* Exhibit 1, Decl. Wang, ECF No. 127-5 at 10 (“Since KP [Pretorius]
3 determined that E.L.M. had no overt signs of a focal source, and did not have a physical
4 examination consistent with meningitis (Exhibit M), the patient did not have a condition
5 warranting further testing or intervention.”). Dr. Wang also concluded, after reviewing
6 Defendant’s EMTALA policy, that RCHSD had adequately designed a medical screening
7 procedure to identify emergency medical conditions and that its staff had followed those
8 procedures in the course of treating Plaintiff. *Id.*

9 By contrast, Plaintiff has failed to present any evidence, expert or otherwise, in
10 support of its argument that Defendant’s course of treatment was insufficient within the
11 meaning of EMTALA. To avoid summary judgment, Plaintiff had the burden of
12 rebutting evidence like Dr. Wang’s testimony and showing that there is, in fact, a genuine
13 dispute of material fact as to whether or not RCHSD provided an “appropriate medical
14 screening examination.” *See Stiles v. Tenet Hosps. Ltd.*, 494 F. App’x. 432, 435 (5th Cir.
15 2012). Plaintiff, however, has failed to produce such evidence. None of Plaintiff’s
16 experts reviewed RCHSD’s EMTALA policy, nor offered any opinion as to whether or
17 not the policy was designed to identify emergency medical conditions. *See, e.g.*, ECF
18 No. 146-2 at 6. Plaintiff’s expert Dr. Mandeville spoke exclusively in terms of prudent
19 care and the standard of care in addressing Plaintiff’s February 17, 2013 visit to RCHSD.
20 *See* Exhibit 2, Declaration of Katherine Mandeville, M.D. at ¶¶ 19-26, ECF No. 146-2 at
21 18-19 (“the gold standard for assessing the severity of dehydration in young children
22 is . . . ,” “[a] reasonably careful emergency room physician inquires about previous
23 visits . . . ,” “in assessing the dehydration of a young child who is vomiting everything
24 and also has diarrhea, a reasonably careful emergency room physician reviews”); *see*

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27 ³ The Court is aware that the admissibility of Dr. Wang’s testimony is a subject of Plaintiff’s motion to
28 exclude expert testimony. *See* ECF No. 133 at 7. Plaintiff’s motion, however, does not object to Dr.
Wang’s opinions on Defendant’s EMTALA policy or conformance therewith, the Court’s current focus,
but to his opinions regarding “the onset and course of the meningococcal infection.” *Id.*

1 *also* Exhibit 12, Deposition of Katherine Mandeville, M.D., ECF No. 146 at 64-71. The
2 same is true of Plaintiff’s expert Marlene Vermeer. *See* Exhibit 4, Declaration of
3 Marleen Vermeer, R.N. at ¶¶ 21, 35-42, ECF No. 146-2 at 33, 35-37 (“If a fluid trial were
4 given, it would be the standard of care . . . ,” “[u]nder the ESI algorithm, the standard of
5 care for the nurse . . . ,” “the standard of care for the nurse was to inquire of the
6 parent . . . ,” “[t]herefore, it was below the standard of care for . . .”).

7 Plaintiff’s failure to make specific arguments about why RCHSD’s course of
8 conduct did not amount to an “appropriate medical screening examination,” makes
9 Plaintiff’s EMTALA argument indistinguishable from a “standard of care” argument.
10 This is problematic because the Ninth Circuit has made clear that EMTALA does not
11 establish a national standard of care and it is not a federal medical malpractice cause of
12 action. *See Bryant*, 289 F.3d at 1165. A hospital does not violate EMTALA if it
13 misdiagnoses a patient, fails to render a diagnosis, or otherwise provides substandard
14 medical care to a patient seeking treatment for an emergency condition. *Id.* at 1166.
15 Rather, a hospital commits an EMTALA violation only if it conducts an examination so
16 cursory that a court may conclude that it was not designed to identify acute and severe
17 symptoms. Thus, while pointing to the deficiencies in RCHSD’s screening may be
18 sufficient to demonstrate that RCHSD’s conduct fell below the operative standard of
19 care, it is not sufficient, without more, to demonstrate an EMTALA violation.

20 The undisputed facts of this case demonstrate that the screening E.L.M. received
21 was far from cursory. An intake triage nurse visited E.L.M. at 7:25 pm, reviewed the
22 onset of her physical condition, and recorded her symptoms. At 8:02 pm, another triage
23 nurse visited E.L.M. to observe her condition. That nurse provided E.L.M. with a drug
24 for her symptoms. At 8:40 pm Pretorius saw E.L.M. Pretorius took E.L.M.’s vital signs
25 and conducted a physical examination. She evaluated E.L.M. for the source of her fever
26 and determined that there was no evidence of “meningitis, pneumonia, or bacterial
27 pharyngitis.” She made a variety of differential diagnoses, but ultimately concluded,
28 based on E.L.M.’s appearance, her family history, and her hydration level, among other

1 facts, that the child likely had a virus, potentially influenza. Accordingly, Pretorius
2 prescribed E.L.M. Zofran and discharged her.

3 Plaintiff has failed to present any evidence, let alone persuasively demonstrate,
4 that this course of treatment was insufficient within the meaning of EMTALA. Because
5 Plaintiff offers no expert testimony to support the assertion that RCHSD performed an
6 “inappropriate medical examination” and because she does not bother to make even a
7 single argument about why RCHSD’s conduct was not designed to identify emergency
8 medical conditions, Plaintiff has failed to raise a triable issue of fact for trial. *See*
9 *Hoffman*, 425 F. Supp. 2d, 1133-35 (granting summary judgment for hospital-defendant
10 on “inappropriate screening” claim because plaintiff experts’ criticisms of defendant’s
11 adherence to the standard of care only amounted to criticism of defendant’s “medical
12 diagnosis and medical judgment” and did not demonstrate an examination “so cursory
13 that it was not designed to detect emergency conditions.”)); *see also Herisko v. Tenet*
14 *Healthcare Sys. Desert Inc.*, 2013 WL 1517973, *4 (C.D. Cal. Apr. 11, 2013)
15 (dismissing plaintiff’s argument that he did not receive an appropriate screening due to
16 the hospital-defendant’s failure to consult a cardiologist or administer an angiogram
17 because EMTALA does not entitle a plaintiff to demand a particular method of
18 screening); *Torres v. Santa Rosa Memorial Hosp.*, 2013 WL 4483469, *2 (N.D. Cal.
19 Aug. 20, 2013) (granting defendant’s Rule 12(b)(6) motion because plaintiff did not
20 provide any evidence suggesting a “cursory” screening, but only argued that the
21 screening must have been inadequate because it failed to detect that the patient had
22 bacterial pneumonia). Accordingly, the Court grants Defendant RCHSD’s motion for
23 partial summary judgment as to Plaintiff’s EMTALA claim.

24 **2. Pendent Jurisdiction**

25 Pursuant to 28 U.S.C. § 1367(a), “in any civil action of which the district courts
26 have original jurisdiction, the district courts shall have supplemental jurisdiction over all
27 other claims that are so related to claims in the action within such original jurisdiction
28 that they form part of the same case or controversy under Article III of the United States

1 Constitution.” Yet even “once judicial power exists under § 1367(a), retention of
2 supplemental jurisdiction over state law claims under 1367(c) is discretionary.” *Acri v.*
3 *Varian Assoc., Inc.*, 114 F.3d 999, 1000 (9th Cir. 1997). “The district court may decline
4 to exercise supplemental jurisdiction over a claim under subsection (a) if . . . the district
5 court has dismissed all claims over which it has original jurisdiction.” 28 U.S.C.
6 § 1367(c)(3). The Supreme Court has cautioned that “if the federal claims are dismissed
7 before trial, . . . the state claims should be dismissed as well.” *United Mine Workers of*
8 *Am. v. Gibbs*, 383 U.S. 715, 726 (1966); *see also Townsend v. Columbia Operations*, 667
9 F.2d 844, 850 (9th Cir. 1982). In the event that all federal law claims are eliminated
10 before trial, a district court must weigh the following factors before declining or choosing
11 to exercise pendent jurisdiction: judicial economy, comity, convenience, and fairness.
12 *See Bryant v. Adventist Health System/W.*, 289 F.3d 1162, 1169 (9th Cir. 2002) (quoting
13 *Carnegie—Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7, 108 S. Ct. 614, 98 L. ED. 2d
14 720 (1988)).

15 Here, the Court has granted summary judgment as to the only remaining federal
16 claim in this case, that is, Plaintiff’s EMTALA claim against RCHSD. Accordingly, the
17 Court is required to consider whether the balance of factors points towards exercising, or
18 declining to exercise, jurisdiction over Plaintiff’s remaining state law claims against
19 RCHSD and the other defendants.

20 The remaining claims are state medical malpractice claims and defenses governed
21 by California law and, as seen above, have no nexus to questions of federal policy. Thus,
22 there is no federal interest served by proceeding with the state law causes of action in
23 federal court, and the interest of comity would be served by permitting the state court to
24 decide issues relating to the remaining state law claims and defenses. That said, comity
25 does not dictate that the Court decline to exercise pendent jurisdiction in order to
26 discourage forum shopping as the Defendants, and not Plaintiff, are the current
27 proponents of exercising pendent jurisdiction. *See* ECF No. 160 & 161. There is also no
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1 evidence that the state law issue involves a novel question of state law that should
2 necessarily be decided by California courts.

3 As to judicial economy, this factor weighs both for and against the exercise of
4 judicial economy. On the one hand, the litigation before this Court has been focused on
5 pre-trial challenges to Plaintiff's EMTALA claim. Three of the defendants filed motions
6 to dismiss Plaintiff's claims based on the failure to state an EMTALA claim. *See, e.g.*,
7 ECF No. 12, Def. PMC's Mot. to Dismiss (moving to dismiss Plaintiff's EMTALA
8 claim); ECF No. 13-1, Defs. CEP and Friedberg's Mot. to Dismiss (arguing that the court
9 lacked subject matter jurisdiction over Plaintiff's medical negligence claim because the
10 EMTALA claims should be dismissed); ECF No. 18-1, Def. RCHSD's Mot. to Dismiss
11 (arguing that subject matter jurisdiction did not exist because Plaintiff had failed to state
12 an EMTALA claim). On the other hand, in ruling on these motions to dismiss and on the
13 instant motion for partial summary judgment, the Court has accumulated institutional
14 knowledge of the facts of this case, which weighs slightly in favor of exercising
15 supplemental jurisdiction.

16 Lastly, with respect to convenience and fairness to litigants, the Court finds that
17 both of these factors weigh heavily in favor of exercising pendent jurisdiction. This
18 litigation has been proceeding in federal court for almost three years. Discovery was
19 extensive and has been closed for months. The parties have exchanged and filed pretrial
20 disclosures. ECF Nos. 157, 158, 159. In other words, the case is ready for trial. To
21 transfer the case to state court at this late hour runs the risk of causing further delay of
22 Plaintiff's day in court and duplicating discovery or pre-trial efforts in state court.
23 Accordingly, given that the question of whether or not to exercise pendent jurisdiction
24 lies within the discretion of the district court, *see, e.g., State of Ariz. v. Cook Paint &*
25 *Varnish Co.*, 541 F.2d 226, 227 (9th Cir. 1976), the Court finds that the balance of
26 factors, led by the interest in fairness and convenience to the litigants, weighs in favor of
27 retaining pendent jurisdiction over the remaining state law claims.

28 // //

1 **3. Motions to Exclude**

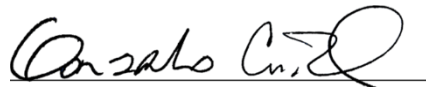
2 Defendant RCHSD’s motion to exclude the expert testimony of Sharon Kawai,
 3 M.D., Mark Remas, and Paul Zimmer, ECF No. 128-1, is denied as moot because the
 4 Court did not rely on any of these experts’ testimony in deciding the current motion.
 5 Defendants Children’s Specialists of San Diego’s and Kelly Pretorius’ motion to exclude
 6 the expert testimony of Lee Wetzler, M.D., ECF No. 129-1, is denied as moot for the
 7 same reason. The Court also denies Plaintiff’s motion to exclude the expert testimony of
 8 Mary Dyes, M.D., Bernard Danneberg, M.D., and Vincent Wang, M.D., ECF No. 133, on
 9 the same grounds. As explained *supra*, Plaintiff only objects to the part of Dr. Wang’s
 10 testimony where he opines upon the onset of E.L.M.’s condition and the standard of care
 11 administered by RCHSD. Because Plaintiff’s objections did not extend to Dr. Wang’s
 12 opinion regarding Defendant’s EMTALA policy or procedures, the Court did not need to
 13 decide Plaintiff’s motion to exclude in order to rule on the instant matter. All of these
 14 motions are denied subject to being refiled by the appropriate date for motions in limine.

15 **CONCLUSION**

16 For the foregoing reasons, the Court **GRANTS** Defendant RCHSD’s motion for
 17 partial summary judgment, **RETAINS** jurisdiction over the remaining state law claims
 18 pursuant to the doctrine of pendent jurisdiction, and **DENIES** the pending motions to
 19 exclude expert testimony as moot.

20 **IT IS SO ORDERED.**

21
 22 Dated: November 16, 2016


 23 Hon. Gonzalo P. Curiel
 24 United States District Judge