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**CONFORMED COPY
ORIGINAL FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES**

DEC 30 2010

5 Attorneys for Defendants AEG Live, LLC,
Anschutz Entertainment Group, Inc., Brandon Phillips,
6 Paul Gongaware, and Timothy Leiweke

John A. Clarke, Executive Officer/Clerk
BY Shaunya Wesley, Deputy

7
8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF LOS ANGELES**

11 KATHERINE JACKSON, individually
and as the Guardian ad Litem of
12 MICHAEL JOSEPH JACKSON, JR.,
PARIS-MICHAEL KATHERINE
13 JACKSON, and PRINCE MICHAEL
JACKSON II

14 Plaintiffs,

15 v.

16 AEG LIVE LLC, ANSCHUTZ
17 ENTERTAINMENT GROUP, INC.;
BRANDON PHILLIPS (aka RANDY
18 PHILLIPS), an individual, KENNETH
ORTEGA (aka KENNY ORTEGA), an
19 individual, PAUL GONGAWARE, an
individual, and TIMOTHY LEIWEKE,
20 an individual, and DOES 1-100,
inclusive,

21 Defendants.

Case No. BC 445597

Hon. Yvette M. Palazuelos, Dept. 28

**DEFENDANTS AEG LIVE, LLC, ANSCHUTZ
ENTERTAINMENT GROUP, INC.,
BRANDON PHILLIPS,
PAUL GONGAWARE, AND
TIMOTHY LEIWEKE'S NOTICE OF
DEMURRER AND DEMURRER TO
PLAINTIFFS' COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF;
DECLARATION OF MARVIN S. PUTNAM IN
SUPPORT**

Complaint Filed: September 15, 2010
Demurring
Defendants Served: November 30, 2010

Date: February 2, 2011
Time: 8:30 a.m.
Dept: 28

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that at 8:30 a.m. on February 2, 2011, or as soon thereafter as the matter may be heard, in Department 28 of the above-captioned Court for the County of Los Angeles, Central District, located at 111 North Hill Street, Los Angeles, California 90012, defendants AEG Live, LLC, Anschutz Entertainment Group, Inc., Brandon Phillips, Paul Gongaware, and Timothy Leiweke ("Defendants") will demur to the first, second, third and fifth causes of action of plaintiffs' complaint on the grounds that plaintiffs lack standing to bring these claims other than as wrongful death theories; to the fifth cause of action on the grounds that it is time-barred on its face as to plaintiff Katherine Jackson; and to the first, second, third, fourth, and fifth causes of action on the grounds that the complaint fails to state a claim as to any Defendant. This Demurrer is based on this Notice of Demurrer; the accompanying Demurrer and Memorandum of Points and Authorities; the Declaration of Marvin S. Putnam and exhibits attached thereto; any reply papers that Defendants may file; the pleadings and papers on file in this action; and any argument or other matters presented to the Court at the hearing.

Dated: December 30, 2010

MARVIN S. PUTNAM
O'MELVENY & MYERS LLP

By: 
Marvin S. Putnam

Attorneys for Defendant AEG Live, LLC,
Anschutz Entertainment Group, Inc., Brandon Phillips,
Paul Gongaware, and Timothy Leiweke

1 **DEMURRER**

2 Defendants AEG Live, LLC, Anschutz Entertainment Group, Inc., Brandon Phillips, Paul
3 Gongaware, and Timothy Leiweke (“Defendants”) hereby demur to plaintiffs’ complaint on the
4 following grounds:

5 **Demurrer to First Cause of Action**

6 1. Pursuant to California Code of Civil Procedure section 430.10(b) and (e),
7 Defendants demur to plaintiffs’ First Cause of Action (Breach of Contract Based and Other
8 Duties of Care) on the ground that plaintiffs lack statutory standing to bring this claim under
9 Code of Civil Procedure section 377.30.

10 2. Pursuant to California Code of Civil Procedure section 430.10(e), Defendants
11 demur to plaintiffs’ First Cause of Action (Breach of Contract Based and Other Duties of Care)
12 on the ground that the complaint fails to state facts sufficient to state a claim against Defendants,
13 or any of them.

14 **Demurrer to Second Cause of Action**

15 3. Pursuant to California Code of Civil Procedure section 430.10(b) and (e),
16 Defendants demur to plaintiffs’ Second Cause of Action (Negligent Hiring, Training, and
17 Supervision) on the ground that plaintiffs lack statutory standing to bring this claim under Code
18 of Civil Procedure section 377.30.

19 4. Pursuant to California Code of Civil Procedure section 430.10(e), Defendants
20 demur to plaintiffs’ Second Cause of Action (Negligent Hiring, Training, and Supervision) on the
21 ground that the complaint fails to state facts sufficient to state a claim against Defendants, or any
22 of them.

23 **Demurrer to Third Cause of Action**

24 5. Pursuant to California Code of Civil Procedure section 430.10(b) and (e),
25 Defendants demur to plaintiffs’ Third Cause of Action (Fraud and Constructive Fraud) on the
26 ground that plaintiffs lack statutory standing to bring this claim under Code of Civil Procedure
27 section 377.30.

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WHEREFORE, Defendants pray that the Court:

1. Sustain this demurrer as to the First, Second, Third, Fourth, and Fifth Causes of Action as to all plaintiffs; and
2. Award such other and further relief as the Court deems just and proper.

Dated: December 30, 2010

MARVIN S. PUTNAM
O'MELVENY & MYERS LLP

By: Marvin S. Putnam
Marvin S. Putnam

Attorneys for Defendant AEG Live, LLC,
Anschutz Entertainment Group, Inc., Brandon Phillips,
Paul Gongaware, and Timothy Leiweke



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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION.

3 The complaint gets one thing right: Michael Jackson's death on June 25, 2009 was a
4 tragic event. It was tragic for his children. It was tragic for his fans. And it was tragic for the
5 Defendants here, who had labored tirelessly to make a reality of Michael Jackson's dream of a
6 triumphant return to the world's stage. Otherwise, however, the complaint gets both the law and
7 the facts entirely wrong. Not only do plaintiffs fail to allege *any* cognizable legal claim (indeed,
8 their novel legal theories go far beyond those previously recognized by *any* court), but many of
9 their allegations are proven false by the very documents they refer to and upon which they
10 necessarily rely. As such, the complaint warrants immediate dismissal with prejudice.

11 A demurrer—which tests “the legal sufficiency of the pleading”—must be sustained when
12 the complaint fails to set forth facts sufficient to state a cause of action. *Comm. on Children's*
13 *Television, Inc. v. Gen. Foods Corp.*, 35 Cal. 3d 197, 213 (1983). In ruling on demurrer, this
14 Court must accept as true the factual allegations in any complaint (irrespective of their actual
15 veracity), but it need not—and should not—accept mere “contentions, deductions or conclusions
16 of facts or law.” *Chicago Title Ins. Co. v. Great W. Fin. Corp.*, 69 Cal. 2d 305, 327 (1968).¹ Nor
17 must this Court accept factual contentions contradicted on their face by documents incorporated
18 by reference into the complaint. Rather, the document's “recitals, if contrary to allegations in the
19 pleading, will be given precedence, and the pleader's inconsistent allegations as to the meaning
20 and effect of an unambiguous document will be disregarded.” 4 Witkin, Cal. Proc. 5th (2008)
21 Plead, § 431, p. 564.

22 Here, plaintiffs lack standing altogether to assert any claims on behalf of Michael Jackson.
23 Otherwise, plaintiffs seek to hold Defendants liable for negligence, but do not allege a legally
24 cognizable duty of care. Similarly, plaintiffs seek to hold Defendants liable for fraud, but do not
25 allege any actual misrepresentations. Plaintiffs next seek to hold Defendants liable under
26 *respondeat superior*, but fail to acknowledge the absence of the necessary employer-employee
27 relationship. And plaintiffs repeatedly contradict both the AEG-Jackson agreement and the draft

28 ¹ Emphases added and internal citations omitted throughout unless otherwise stated.

1 AEG-Murray agreement—upon which they necessarily rely—in a vain attempt to create a viable
2 cause of action where none exists. These attempts must be rejected, and plaintiffs' complaint
3 must be dismissed for what it is—a colorful fiction with no basis in fact or law.

4 **II. PLAINTIFFS LACK STANDING.**

5 Plaintiffs lack standing to assert claims on behalf of Michael Jackson. "Every action must
6 be prosecuted in the name of the real party in interest, except as otherwise provided by statute."
7 Cal. Code Civ. Proc. § 367. Plaintiffs are not the real party in interest here. The claims of a
8 decedent such as Michael Jackson can *only* be pursued by his personal representative (or, if there
9 is none, then by his successor in interest). Cal. Code Civ. Proc. § 377.30. Plaintiffs are neither—
10 as Michael Jackson very specifically ensured they would not be.² Nor do they even claim to be.
11 As such, plaintiffs' first, second, third, and fifth causes of action must be dismissed for lack of
12 standing to the extent they improperly attempt to assert claims on behalf of Michael Jackson.

13 **III. THE FIRST CAUSE OF ACTION MUST BE DISMISSED.**

14 As plaintiffs lack standing to bring a claim on behalf of Michael Jackson, plaintiffs'
15 complaint, *at best*, must be construed as an ostensible wrongful death action seeking recompense
16 for plaintiffs' financial losses—though it is by no means pleaded as such. Even if so construed,
17 however, each claim still warrants demurrer, because each still fails to state a cause of action.

18 Vaguely labeled "breach of contract based and other duties of care," plaintiffs' first cause
19 of action attempts to claim the negligent breach of various unspecified duties that Defendants
20 ostensibly owed to Michael Jackson. *See, e.g.*, Compl. ¶¶ 63 ("AEG committed independent
21 negligence as against Jackson"), 62, 64 (same). Yet, no such duties exist—which is precisely
22 why plaintiffs' claim is so impermissibly vague. *See, e.g., Green v. Uccelli*, 207 Cal. App. 3d
23 1112, 1119 (1989) (vague allegations fall short of stating a claim and warrant dismissal).

24 Whether an actual duty was pled is a question of law for this Court appropriately
25 determinable on demurrer. *Melton v. Boustred*, 183 Cal. App. 4th 521, 531 (2010). A complaint
26 is "fatally defective" if it does not state defendants owed a legally cognizable duty. *Hegyev v.*

27 ² Michael Jackson's estate is in probate, and the probate court appointed John Branca and John
28 McClain as Michael Jackson's personal representatives. The order appointing them is attached
(Putnam Decl., Ex. C), and may be judicially noticed (Cal. Evid. Code §§ 451(a) & 452(d)).

1 *Unjian Enter., Inc.*, 234 Cal. App. 3d 1103, 1111 (1991). Here, rather than pleading a recognized
2 and cognizable legal duty (as they cannot), plaintiffs instead hope to create new theories of
3 liability, with endless permutations and far-reaching consequences that would transform the
4 entertainment, insurance, and medical industries. Thus, plaintiffs allege no actual, recognized
5 duties of care, but instead outline a number of supposed actions and inactions by Defendants that
6 they contend warrant liability. None of these alleged actions or inactions—several of which are
7 contradicted by documents cited by plaintiffs themselves—rise to the level of an actual legal duty
8 or its breach. As such, plaintiffs' first cause of action must fail as a matter of law. *Id.*

9 **A. The Performance Contract Did Not Create Some Special Duty of Care.**

10 In their futile attempt to create both new law and a new duty of care, plaintiffs first allege
11 that the contract between AEG Live, LLC and Michael Jackson somehow "created a legal duty
12 for AEG to act reasonably toward the physical well-being of Michael Jackson."³ Compl. ¶ 54.
13 Specifically, plaintiffs claim the AEG-Jackson agreement created a tort duty of care because it
14 "included many things like AEG providing a safe residence and safe transportation for Michael
15 Jackson" and "required much from Michael Jackson physically." Compl. ¶ 54. Yet, no Court has
16 ever so held. Never. In fact, no court has ever held that a business's contractual obligation to
17 provide amenities, such as housing or transportation, somehow creates some general duty of care
18 for the health and well-being of the contracting party. That is because it is simply not the law.
19 Rather, the only duty created by such provisions is the limited duty—*created by every contract*—
20 to act reasonably in carrying out the contract's express terms. *See, e.g., N. Am. Chem. Co. v.*
21 *Superior Court*, 59 Cal. App. 4th 764, 774 (1997); *cf. Suarez v. Pac. Northstar Mech., Inc.*, 180
22 Cal. App. 4th 430, 439 (2009) (contractual provision requiring company to take due care in
23 progress of work *did not create general duty to protect* workers from other kinds of injury).

24 Nor does the fact that a contract requires physically demanding work make one
25 contracting party responsible for the health of the other party. After all, such an outcome would
26 make every contracting party an involuntary insurer. Moreover, it would fly in the face of the

27 ³ Since plaintiffs did not include the contract in their complaint, though they relied upon it, a copy
28 is attached. Putnam Decl., Ex. A. Interpretation of the contract is a matter of law for this Court.
See Suarez v. Pac. Northstar Mech., Inc., 180 Cal. App. 4th 430, 439 (2009).

1 well-settled rule that one generally has no duty to come to the aid of another. *See Williams v.*
2 *Cal.*, 34 Cal. 3d 18, 23 (1983) (“[a] person who has not created a peril is not liable in tort merely
3 for failure to take affirmative action to assist or protect another”); *Suarez*, 180 Cal. App. 4th at
4 438 (this rule “remains a fundamental and long-standing rule of tort law”).

5 This Court must recognize the AEG-Michael Jackson contract for what it was: a
6 performance agreement between two independent parties to put on a concert tour. Nothing more.
7 The only “duties” it created were those voluntarily agreed to by the parties. Plaintiffs’ claims of
8 negligence as a result of contract-based duties of care therefore must be dismissed.

9 **B. AEG and Michael Jackson Did Not Have a “Special Relationship.”**

10 Unable to fabricate a nonexistent contractual duty of care, plaintiffs next try to apply the
11 clearly inapplicable special relationship doctrine. As noted above, a person generally does not
12 have a tort duty to protect another from the conduct of third persons. *Williams*, 34 Cal. 3d at 23.
13 Plaintiffs allege, however, that AEG nonetheless should be liable for Michael Jackson’s death at
14 the alleged hands of Dr. Conrad Murray because AEG had a “special relationship” with Michael
15 Jackson. Compl. ¶ 60. Yet, once again no court has ever recognized such a duty in any remotely
16 analogous situation. Never. The reason is simple. The special relationship doctrine *only* comes
17 into play to protect people in exceptional situations of dependency. *See Olson v. Children’s*
18 *Home Soc’y*, 204 Cal. App. 3d 1362, 1366-67 (1988) (affirming sustention of demurrer on
19 grounds that no special relationship existed because there was no justifiable dependency or
20 reliance between the parties). Courts have thus only recognized special relationships in very
21 limited circumstances—such as between a parent and child, a county and a foster child, a police
22 officer and a stopped motorist, a jailor and a prisoner, and the Boy Scouts and a young scout.
23 *See, e.g., id.*; *Ronald S. v. Cnty. of San Diego*, 16 Cal. App. 4th 887, 895 (1993); *Lugtu v. Cal.*
24 *Highway Patrol*, 26 Cal. 4th 703, 717 (2001); *Juarez v. Boy Scouts of Am., Inc.*, 81 Cal. App. 4th
25 377, 410-11 (2000). These are entirely unlike the professional relationship here between AEG, a
26 concert promoter, and Michael Jackson, a highly successful, 50-year-old recording artist.

27 As such, plaintiffs’ attempts to plead that Michael Jackson was dependent or reliant on
28 AEG are simply unavailing. Plaintiffs nonetheless spend much of the first cause of action

1 alleging AEG exerted “an extraordinary degree of control” over Michael Jackson. Compl. ¶ 57;
2 *see also* ¶¶ 60, 63, 64. What they do not do is allege any *facts* supporting this alleged control.
3 Instead, they allege only that Michael Jackson was *financially* dependent on the proceeds he
4 hoped to earn from the concert series and, therefore, on advanced expenses and fringe benefits
5 (including a rented house) from AEG. *Id.* ¶¶ 21, 23, 54, 60. Plaintiffs also allege that AEG
6 threatened to exercise its contractual right to cancel the concert series if Michael Jackson did not
7 meet his contractual obligations to attend rehearsals and perform. *Id.* ¶¶ 37, 62. Yet, these same
8 allegations are patently typical of the millions of contractual relationships in which one party
9 depends disproportionately on the proceeds—for instance, all agreements to finance a fledgling
10 business enterprise or to become a manufacturer’s sole supplier. As such, they are wholly
11 insufficient to establish the custody or dependence necessary for a “special relationship.” *See,*
12 *e.g.*, 6 Witkin, Cal. Sum. 10th (2005), Torts § 1049, p. 354 (describing recognized special
13 relationships).

14 In an apparent attempt to overcome this plain deficiency, plaintiffs also allege that AEG
15 exerted pressure on Michael Jackson by threatening to exercise its contractual right to cancel the
16 concerts for nonperformance, in order to persuade Michael Jackson to accept medical care
17 provided by Dr. Murray. *See* Compl. ¶¶ 25, 37, 55, 64. Plaintiffs also allege AEG used the same
18 pressure to dissuade Michael Jackson from seeing other physicians, *id.* ¶¶ 25, 36, 57, 63, and
19 directed Dr. Murray to make rehearsal attendance a priority of treatment, *id.* ¶¶ 38, 57. While a
20 clear fiction created by plaintiffs in the hopes of salvaging their baseless claims, these alleged
21 facts nonetheless would not create the necessary “special relationship” even if they were true (and
22 they are not). After all, even with plaintiffs’ fictionalized allegations, the pressure placed on
23 Michael Jackson to accept Dr. Murray’s services remains purely financial. Michael Jackson was
24 not helpless or incompetent; he lived in his own home, negotiated his own contracts, engaged his
25 own attorneys, and cared for his own family. He at all times retained the option of refusing Dr.
26 Murray’s services,⁴ or of cancelling his agreement with AEG. In sum, unlike those limited

27 ⁴ The AEG-Jackson agreement, under which AEG was obligated to perform, contained no
28 provision authorizing AEG to require Michael Jackson to accept any medical services, other than
a routine physical for insurance purposes. *See* Putnam Decl. Ex. A at 9.

1 situations where a special relationship has been found, here AEG in no way actually *controlled*
2 Michael Jackson's conduct even under plaintiffs' alleged facts. Plaintiffs' claims of negligence
3 as a result of a special relationship duty of care therefore must be dismissed.

4 **C. Michael Jackson—Not AEG—Controlled His Own Medical Care and Hired**
5 **His Own Longtime Personal Physician, Dr. Conrad Murray.**

6 Even if this alleged fictional scenario *would have* somehow created a special relationship
7 (and it would not), plaintiffs' manufactured allegations in any event must be disregarded by this
8 Court as they are pointedly contradicted by the very documents upon which plaintiffs' complaint
9 necessarily relies. *See Mission Oaks Ranch, Ltd. v. Cnty. of Santa Barbara*, 65 Cal. App. 4th 713,
10 720-21 (1998), *disapproved on other grounds, Briggs v. Eden Council for Hope & Opportunity*,
11 19 Cal. 4th 1106 (1999) (when documents incorporated into a complaint contradict allegations,
12 allegations are to be disregarded); *see also Dodd v. Citizens Bank of Costa Mesa*, 222 Cal. App.
13 3d 1624, 1626-27 (1990). In their complaint, plaintiffs repeatedly cite to a draft written
14 agreement between Dr. Murray and AEG—an agreement plaintiffs allege AEG prepared and Dr.
15 Murray signed as reflecting his understanding of any AEG-Murray agreement.⁵ *See* Compl. ¶¶
16 40-42, 48. Yet, that draft agreement expressly states that Dr. Murray and his medical company
17 were to be engaged as independent contractors "*at [Michael Jackson's] request.*" Putnam Decl.
18 Ex. B ¶ A. It further adds that Dr. Murray "represents . . . that *he acts as [Michael Jackson's]*
19 *general practitioner.*" *Id.* ¶ B. Moreover, the draft agreement provides that all obligations
20 between AEG and Dr. Murray were *expressly conditioned* on Michael Jackson's written consent.⁶
21 Unless Michael Jackson signed the agreement, acknowledging that *he requested* Dr. Murray's
22 services, then Dr. Murray would have no contract with AEG and AEG would have no obligations
23 to Dr. Murray. *Id.* at 6, ¶ 9. The agreement was also to be "immediately terminable" if *Michael*
24 *Jackson* "decide[d] for any reason that [Michael Jackson] no longer want[ed] or need[ed] the
25 services of Dr. Murray," *id.* ¶ 7.3. And the costs of Dr. Murray's services were to be borne

26 _____
27 ⁵ This draft agreement, incorporated by reference into the complaint, is attached as Exhibit B to
the Putnam Declaration.

28 ⁶ Paragraph 9 provides that without such consent, "neither party to the Agreement will have any
rights or obligations to one another . . ." *Id.* ¶ 9.

1 principally by *Michael Jackson*. *Id.* at 6.

2 In other words, plaintiffs' claims that AEG selected Dr. Murray, paid Dr. Murray, and
3 forced Dr. Murray's services on Michael Jackson are exactly backwards. As the draft contract
4 plaintiffs explicitly rely upon makes perfectly clear, Dr. Murray was *Michael Jackson's* personal
5 physician. AEG did not choose or hire Dr. Murray; it merely conducted negotiations aimed at
6 retaining him as an independent contractor on the tour—but *only for Michael Jackson's benefit*
7 *and only if Michael Jackson expressly consented to its doing so*. *Id.* at 6. In conducting these
8 negotiations—which were never completed—AEG could not have entered into a “special
9 relationship” with Michael Jackson. Plaintiffs' contrary allegations must be disregarded.

10 **D. The Other Alleged “Facts” Are Also Insufficient to Create a Duty Of Care.**

11 In a last-ditch effort to present any facts that might somehow create a duty owed by
12 Defendants, plaintiffs offer a scattershot of inchoate allegations. None support the finding of a
13 duty here.

14 **1. Joint Venturers Do Not Owe Non-Financial Duties of Care.**

15 For instance, plaintiffs' allegation that AEG owed Michael Jackson a duty as the result of
16 a joint-venture relationship, *see* Compl. ¶¶ 56, 60, 67, does not support liability here. Joint
17 venturers owe each other fiduciary *business* duties; they are not responsible for each other's
18 medical care and well-being. *See Stodd v. Goldberger*, 13 Cal. App. 3d 827, 836 (1977) (joint
19 venturers owe duties of business partners); Cal. Corp. Code §§ 16403-16405 (outlining duties).

20 **2. Premises Liability Is Equally Inapt.**

21 Similarly, plaintiffs suggest that AEG assumed premises liability because, they allege,
22 AEG paid the rent on Michael Jackson's house. Compl. ¶¶ 23, 41, 59. Yet, we have not located a
23 single authority that would even suggest that lending a person money with which to secure a lease
24 would somehow create premises liability. Moreover, even if lending such monies could
25 somehow create premises liability (and it cannot), AEG still would not owe a duty to protect
26 Michael Jackson from injury done by *his treating physician* in his home. *See, e.g., Mata v. Mata*,
27 105 Cal. App. 4th 1121, 1131-32 (2003) (landlord owed no duty to protect tenant's guest from
28 injuries caused by tenant's action rather than by the premises itself).

1 **3. An Unexecuted Agreement Does Not Somehow Create a Duty of Care.**

2 Finally, plaintiffs' allegation that AEG is liable because it failed to provide a nurse and
3 medical equipment to Dr. Murray is foreclosed by the draft Murray-AEG agreement, which
4 expressly states that AEG owed Dr. Murray no obligations unless the agreement was signed by
5 Michael Jackson. Putnam Decl., Ex. B ¶ 9. Dr. Murray signed the agreement—indicating he
6 understood he would receive no medical equipment unless Michael Jackson also signed the
7 agreement—and Michael Jackson did not sign. *Id.* at 6. Plaintiffs' allegations that AEG agreed
8 to provide equipment cannot survive the unambiguous language of the draft agreement. *See*
9 *Mission Oaks Ranch*, 65 Cal. App. 4th at 720-21.

10 **E. No Duty Existed Because Michael Jackson's Injury Was Not Foreseeable.**

11 In addition to all of the above, plaintiffs also failed to allege a viable duty of care under
12 any theory—contract, special relationship, or otherwise—because they failed to allege that the
13 injury to Michael Jackson was reasonably foreseeable. “Duty is not an immutable fact, but rather
14 an expression of policy considerations leading to the legal conclusion that a plaintiff is entitled to
15 a defendant's protection.” *Ludwig v. City of San Diego*, 65 Cal. App. 4th 1105, 1110 (1998). The
16 primary consideration in determining the existence of a duty is the foreseeability of harm to the
17 plaintiff. *See, e.g., Hedlund v. Superior Court*, 34 Cal. 3d 695, 705 (1983). If the injury was not
18 foreseeable, there can be no duty. *Ludwig*, 65 Cal. App. 4th at 1111-12.

19 Here it simply was not foreseeable, even on the most liberal view of the facts alleged, that
20 Dr. Murray, a licensed physician with no alleged history of malpractice, would administer
21 *anesthesia* in Michael Jackson's home, and that Michael Jackson would die as a result of an
22 overdose of that anesthesia. Plaintiffs do not allege any facts indicating that Defendants, or any
23 of them, knew or should have known that Michael Jackson was abusing anesthesia in his home.
24 Instead, they allege only that Michael Jackson appeared ill and tired in the days before his death.
25 Compl. ¶¶ 58, 73. This might theoretically be pertinent to a foreseeability analysis if Michael
26 Jackson's death had been due to an undiagnosed illness. But it in no way suggests that Michael
27 Jackson was likely to die in the way he allegedly did—as a result of reckless conduct by a doctor
28

1 acting far outside the standard of care.⁷ Compl. ¶¶ 101, 103-04.

2 “[L]iability for unforeseen and unforeseeable consequences of one’s conduct is liability
3 without fault, and not negligence liability.” *Ludwig*, 65 Cal. App. 4th at 1111. Under these
4 circumstances, it makes no sense to impose on Defendants a duty to prevent the totally
5 unforeseeable circumstance that Michael Jackson would die in his home from an overdose of
6 anesthesia. Accordingly, this Court should find that no such duty exists, or can be pleaded, and
7 should dismiss plaintiffs’ first cause of action.

8 **IV. THE SECOND CAUSE OF ACTION MUST BE DISMISSED.**

9 Plaintiffs’ second cause of action for negligent supervision of Dr. Murray must likewise
10 be dismissed for failure to state a claim. Plaintiffs fail to state a claim for negligent hiring or
11 supervision for two reasons. First, as detailed *supra* in Part III and *infra* in Part VII, plaintiffs’
12 allegation that AEG employed Dr. Murray in any capacity is contradicted by the very documents
13 upon which their complaint relies. Accordingly, AEG could not have hired or supervised Dr.
14 Murray *negligently* because AEG did not hire or supervise Dr. Murray *at all*. See *supra* at 6-7.

15 Second, plaintiffs failed to plead the most critical element of any negligent supervision
16 claim: namely, that Defendants had actual or constructive knowledge that Dr. Murray was likely
17 to injure Michael Jackson in the way that he was injured. A plaintiff alleging negligent hiring or
18 supervision *must* show that “the employer knows, or should know, that the employee, because of
19 past behavior or other factors, is *unfit for the specific tasks to be performed*.” *Federico v.*
20 *Superior Court*, 59 Cal. App. 4th 1207, 1215 (1997). A plaintiff must plead that the employee
21 “created a particular risk or hazard and that *particular* harm materializes.” *Doe v. Capital Cities*,
22 50 Cal. App. 4th 1038, 1054 (1996).

23 Plaintiffs have not alleged *even one fact* that indicates Defendants were warned or put on
24 notice that Dr. Murray was unfit to be Michael Jackson’s doctor. Plaintiffs do not allege
25 Defendants had *actual* knowledge that Dr. Murray was administering propofol in Michael

26 _____
27 ⁷ Dr. Murray’s alleged conduct was so outside the mainstream of medical practice that he has
28 been criminally charged with homicide for administering the anesthesia drug propofol to Michael
Jackson. See Felony Complaint For Arrest Warrant, *People v. Murray*, Case No. SA073164
(filed Feb. 8, 2010).

1 Jackson's home. Nor do plaintiffs adequately allege constructive knowledge. Instead, plaintiffs
2 allege only, in conclusory fashion, that AEG "knew or should have known that Murray was
3 nightly administering sleep remedies to Jackson." Compl. ¶ 42. Yet, plaintiffs tellingly do not
4 cite a *single fact* suggesting *how* AEG could have obtained this knowledge. For instance, they do
5 not suggest that Dr. Murray had any history of administering sleep remedies to patients, or that
6 anyone told Defendants that Dr. Murray was administering sleep remedies to Michael Jackson.
7 Nor do plaintiffs allege that AEG knew or should have known Dr. Murray was administering
8 *anesthesia* rather than "sleep remedies"—a critical distinction in terms of dangerousness. *See*
9 Compl. ¶ 29 (propofol is "commonly used to induce and maintain general anesthesia in a hospital
10 setting"). Because plaintiffs' conclusory allegation is unsupported by facts, this Court should not
11 assume its truth for purposes of demurrer. *See Delgado v. Am. Multi-Cinema, Inc.*, 72 Cal. App.
12 4th 1403, 1406 (1999) (court need not admit "contentions, deductions or conclusions of fact or
13 law"); *see also Bagatti v. Dept. of Rehab.*, 97 Cal. App. 4th 344, 366 n.8 (2002) ("conclusionary
14 allegations, which allege no specific acts, are insufficient to survive demurrer").

15 Without actual or constructive knowledge of Dr. Murray's administration of anesthesia,
16 plaintiffs' negligent supervision claim rests on plaintiffs' allegations that AEG "paid Murray
17 excessively," Compl. ¶ 77, that AEG asked Dr. Murray to ensure that Michael Jackson attend
18 rehearsals, *id.*, that AEG did not conduct a background check before hiring Murray, *id.* ¶ 75, and
19 that Michael Jackson appeared ill despite being under Dr. Murray's care, *id.* ¶ 76.

20 Yet, not one of these allegations is sufficient to give Defendants actual or constructive
21 knowledge that Dr. Murray, a licensed physician, *see id.* ¶ 102, would violate his professional
22 obligations by administering anesthesia to Michael Jackson at home. For instance, the amount
23 Defendants allegedly paid Dr. Murray has no bearing on his fitness to treat Michael Jackson.⁸
24 Indeed, a more able physician likely commands better payment. Similarly, Defendants' alleged
25 request that Dr. Murray assist Michael Jackson in attending rehearsals could not conceivably have
26 put Defendants on notice that Dr. Murray was likely to administer *anesthesia* in *Michael*
27 *Jackson's home*. How could it? And Defendants' alleged failure to conduct a background check

28 ⁸ In fact, AEG never paid Dr. Murray at all.

1 would be pertinent only if plaintiffs *also* alleged that such a check would have revealed facts
2 sufficient to put Defendants on notice of Murray's dangerousness. But plaintiffs did not—and
3 could not—do so. So this allegation also fails to advance their claim. *See, e.g., Juarez*, 81 Cal.
4 App. 4th at 397 (affirming summary judgment where employee's background revealed no
5 specific warning that employee posed an unreasonable risk). Finally, it is self-evident that
6 someone under the care of a physician may appear ill for reasons other than his physician
7 improperly harming him.

8 In short, none of plaintiffs' allegations demonstrate that Defendants should have known
9 Dr. Murray created the risk of the *particular* harm that materialized—Dr. Murray's
10 administration of an overdose of anesthesia to Michael Jackson in his home. Accordingly, their
11 claim for negligent hiring and supervision necessarily must be dismissed.

12 **V. THE THIRD CAUSE OF ACTION MUST BE DISMISSED.**

13 Plaintiffs' third cause of action for fraud and constructive fraud must also be dismissed
14 because plaintiffs fail to state a claim for fraud. The elements of fraud are: (1) misrepresentation;
15 (2) knowledge of falsity; (3) intent to defraud; (4) justifiable reliance; and (5) resulting damage.
16 *See Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996). In California, these elements "must be
17 pled specifically; general and conclusory allegations do not suffice." *Id.* at 645. This means
18 plaintiffs must plead "facts which show how, when, where, to whom, and by what means the
19 representations were tendered." *Id.* Moreover, because plaintiffs have sued corporate defendants,
20 their burden is even greater. A "fraud action against a corporation requires the plaintiff[s] to
21 allege the names of the persons who made the allegedly fraudulent representations, their authority
22 to speak, to whom they spoke, what they said or wrote, and when it was said or written."
23 *Tarmann v. State Farm Mut. Auto. Ins. Co.*, 2 Cal. App. 4th 153, 157 (1991). Constructive fraud
24 must be pleaded with equal specificity. *Schauer v. Mandarin Gems of Cal., Inc.*, 125 Cal. App.
25 4th 949, 960-61 (2005).⁹

26 _____
27 ⁹ Though plaintiffs purport to bring a claim for constructive fraud, they plead none of its
28 elements—most notably, they fail to plead they were in a special, confidential, or fiduciary
relationship with any defendant. *See, e.g., Peterson Dev. Co. v. Torrey Pines Bank*, 233 Cal.
App. 3d 103, 116 (1991). Thus, the claim must be dismissed for this additional reason as well.

1 Plaintiffs fail entirely to meet this burden. Instead, they allege only generally that
2 Defendants “made false representations to Michael Jackson that they were looking out for his best
3 interests and well-being” and “that they would provide a doctor and equipment to Jackson to keep
4 him healthy.” Compl. ¶ 84. Plaintiffs do not actually specify the representations made. Nor do
5 they make any attempt to identify who made these statements, when they were made, by what
6 means they were made, or whether the speaker had authority to make them. Instead, they state
7 only that “AEG directors and managing agents, including Randy Phillips” communicated “these
8 misrepresentations” “on June 18, 2009, as well as at other dates.” *Id.* This allegation is wholly
9 insufficient to meet plaintiffs’ burden to plead fraud with specificity, as plaintiffs fail altogether to
10 identify *how, where, when, by whom, and in what form* the claimed statements were allegedly
11 made.¹⁰ Plaintiffs’ allegations are therefore insufficient to state a claim for fraud. *See, e.g.,*
12 *Goldrich v. Natural Y Surgical Specialties, Inc.*, 25 Cal. App. 4th 722, 783 (1994) (sustaining
13 demurrer because it was impossible “to determine what was said or by whom or in what manner”
14 or to determine “whether the statements were made in writing . . . or orally . . . or by one or all of
15 the defendants”).

16 In addition, as discussed *supra*, at 6-7, plaintiffs’ allegation that Dr. Murray was provided
17 by AEG against Michael Jackson’s wishes is inconsistent with the draft AEG-Murray agreement
18 and should be disregarded. For both of these reasons, the claim must be dismissed.

19 **VI. THE FOURTH CAUSE OF ACTION MUST BE DISMISSED.**

20 Plaintiffs’ fourth cause of action for negligent infliction of emotional distress (filed by
21 plaintiff Michael Joseph Jackson, Jr. only) must also be dismissed for failure to state a claim. The
22 tort of negligent infliction of emotional distress is very limited in California. To state a viable
23 claim, plaintiff must allege he “(1) is closely related to the injury victim; (2) is present at the
24 scene of the injury-producing event at the time it occurs and is then aware that it is causing injury

25 ¹⁰ At most, the complaint only identifies Randy Phillips as making some unspecified
26 representation on June 18, 2009. Even if alleging that numerous misrepresentations were made
27 over time, plaintiffs were required to provide a representative sample with the appropriate degree
28 of specificity. *See Goldrich v. Natural Y Surgical Specialties, Inc.*, 25 Cal. App. 4th 772, 783
(1994) (“in a case involving numerous oft-repeated misrepresentations, the plaintiff must, at a
minimum, set out a representative selection of the alleged misrepresentations”). They did not.

1 to the victim; and (3) as a result suffers serious emotional distress. . . .” *Bird v. Saenz*, 28 Cal. 4th
2 910, 915 (2002) (citing *Thing v. La Chusa*, 48 Cal. 3d 644 (1989)). These requirements are
3 strictly construed. *Id.* In the case of medical malpractice, a plaintiff must observe both the
4 malpractice itself (and not merely its consequences), and must understand *at the time* that he is
5 observing malpractice. *Bird*, 28 Cal. 4th at 915-18; *see also Morton v. Thousand Oaks Surgical*
6 *Hosp.*, 187 Cal. App. 4th 926, 935-36 (2010) (affirming sustention of demurrer without leave to
7 amend where plaintiffs observed their mother’s suffering, but did not witness procedure that
8 injured her).

9 Plaintiff fails entirely to allege the required second element. While he states he
10 “witnessed his father suffering” “during the course of Michael Jackson being injured and dying,”
11 Compl. ¶ 91, he does not allege he was present *at the scene* of the injury-producing event
12 (presumably Dr. Murray’s administration of propofol to Michael Jackson), nor does he allege he
13 was aware that the event was causing injury to Michael Jackson *at the time it occurred*.

14 Accordingly, this claim must be dismissed for failure to state a claim.

15 **VII. THE FIFTH CAUSE OF ACTION MUST BE DISMISSED.**

16 Finally, plaintiffs’ fifth cause of action for *respondeat superior* must be dismissed for
17 failure to state a claim. Like plaintiffs’ first cause of action, plaintiffs’ allegations are
18 contradicted on their face by documents which the complaint incorporates by reference. The fifth
19 cause of action must also be dismissed as to Katherine Jackson because it is time-barred and as to
20 defendants Phillips, Gongaware, and Leiweke because *respondeat superior* flows to employers,
21 not co-employees.

22 **A. Plaintiffs’ Claim That AEG Employed Dr. Murray Is Contradicted by the** 23 **Draft AEG-Murray Agreement and So Must Be Disregarded.**

24 Plaintiffs allege that AEG was the “controller and employer” of Dr. Murray, and that
25 accordingly AEG should be vicariously liable for Dr. Murray’s alleged negligence. Compl. ¶ 96.
26 Plaintiffs make two claims: first, that AEG orally agreed to employ Dr. Murray, and second, that
27 AEG employed Murray through a written contract signed by Dr. Murray on June 24, 2010.
28 Compl. ¶¶ 27, 32, 40-42, 48. Both of these claims must be disregarded because they are

1 expressly refuted by the draft AEG-Murray agreement, incorporated by reference in the
2 complaint. See Putnam Decl. Ex. B.

3 The draft agreement shows plainly that Dr. Murray and a subsidiary of AEG were
4 *negotiating* an independent contractor agreement—but that agreement, by its own terms, never
5 became effective. Rather, the draft agreement indicates that absent formal, written endorsement
6 by Michael Jackson, the parties would have no “rights or obligations” to one another. Putnam
7 Decl. Ex. B ¶ 9. The agreement also reveals on its face that this formal, written endorsement
8 never took place. On page six, there is a space for Michael Jackson to confirm “that he has
9 requested [AEG’s subsidiary] to engage Dr. Murray on the terms set forth herein on behalf of and
10 at the expense of the undersigned.” Putnam Decl. Ex. B at 6. That signature box is blank. *Id.*

11 Plaintiffs allege that AEG prepared and sent the draft agreement to Dr. Murray on June
12 23, and that Dr. Murray signed the agreement on June 24. Compl. ¶ 48. Thus, the draft clearly
13 reflected *both parties’* understanding as of June 24, 2009. By signing the document, Dr. Murray
14 confirmed his understanding that absent Michael Jackson’s signature, there would be no
15 employment or independent contractor agreement between them. The draft agreement is plain
16 and unambiguous, and unequivocally demonstrates that AEG and Dr. Murray did not have an oral
17 or written employment relationship of any kind. See *Beck v. Am. Health Grp. Int’l. Inc.*, 211 Cal.
18 App. 3d 1555, 1563 (1989) (“By signing the letter plaintiff assented to its terms, i.e., no binding
19 agreement would result until a formal contract was drafted by counsel.”).

20 Plaintiffs’ claims that AEG employed Dr. Murray must yield to the plain text of the
21 agreement. It is well-settled that where a pleading relies on a document, it cannot replace the
22 document’s provisions with its own allegations. “The [document’s] recitals, if contrary to
23 allegations in the pleading, will be given precedence, and the pleader’s inconsistent allegations as
24 to the meaning and effect of an unambiguous document will be disregarded.” 4 Witkin, Cal.
25 Proc. 5th (2008) Plead, § 431, p. 564. “That plaintiff may have intended or believed a binding
26 contract came into existence upon his signing the letter is immaterial in the face of its language
27 which plainly indicated otherwise.” *Beck*, 211 Cal. App. 3d at 1563 (dismissing case on
28 demurrer). Accordingly, plaintiffs’ fifth cause of action for *respondeat superior* must be

1 dismissed. *See id.*; *Bashford v. A. Levy & J. Zentner Co.*, 123 Cal. App. 204, 209 (1932) (where
2 complaint alleged a partnership but purported partnership agreement was unsigned, allegations
3 properly struck); *Hill v. Santa Barbara*, 196 Cal. App. 2d 580, 586 (1961) (demurrer sustained
4 where allegations concerning the meaning of a deed were contradicted by terms of the deed).

5 **B. The Fifth Cause of Action Also Fails Because It Is Time-Barred and Because It**
6 **Cannot Be Brought Against the Individual Defendants.**

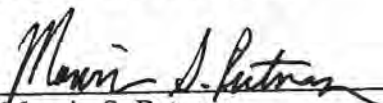
7 Plaintiffs' fifth cause of action is also time-barred as to Katherine Jackson. Claims for
8 wrongful death due to medical negligence are subject to a one-year statute of limitations under
9 Code of Civil Procedure section 340.5.¹¹ Because this claim seeks to hold Defendants liable for
10 the medical negligence of their purported employee, Dr. Murray, it is subject to all the defenses
11 that could be brought by Dr. Murray himself. *See Lathrop v. Healthcare Partners Med. Grp.*, 114
12 Cal. App. 4th 1412, 1423 (2004). Katherine Jackson failed to bring her claim within one year of
13 Michael Jackson's death on June 25, 2009. *See Compl.* ¶ 49. Accordingly, her claim warrants
14 dismissal on this independent ground.

15 The fifth cause of action must also be dismissed against individuals Phillips, Gongaware,
16 and Leiweke. Even if AEG employed Dr. Murray (and plainly it did not), vicarious liability
17 flows to the employer, not to other alleged employees. *See Frances T. v. Vill. Green Owners*
18 *Ass'n*, 42 Cal. 3d 490, 503-04 (1986). There is no basis for holding these individuals vicariously
19 liable for Dr. Murray's conduct.

20 **VIII. CONCLUSION.**

21 For the foregoing reasons, this demurrer should be sustained as to all causes of action.

22 Dated: December 30, 2010 MARVIN S. PUTNAM
O'MELVENY & MYERS LLP

23
24 By: 
Marvin S. Putnam

25 Attorneys for Defendants AEG Live, LLC,
26 Anschutz Entertainment Group, Inc., Brandon Phillips,
Paul Gongaware, and Timothy Leiweke

27
28 ¹¹ The children's claims are subject to statutory tolling under the same section.