

Katherine Jackson V AEG Live September 9th 2013 (Some comments have been made by our founder in)



No witnesses, case against Phillips and Gongaware dismissed

Morning session only waiting for noon

Judge. Good morning. Okay. A little bit of housekeeping. Juror no. 1 --

Mr. Panish. Your honor, should we discuss this like we did with the other alternate? I assume there's some issues related to juror no. 1.

Judge. There are, but -- what do you mean?

Mr. Panish. Well, I remember when the other one was going to be dismissed --

Judge. No, we're not going to dismiss her.

Mr. Panish. Oh, okay. That's okay. I don't know.

Judge. I mean, at some point if you think we need to say something --

Mr. Panish. Fair enough. I just didn't know.

Judge. I don't think so.

Mr. Panish. Okay. All right. I'm sorry.

Judge. But if something comes up that you think should be, let me know.

Mr. Panish. Sure. No problem. I'm sorry.

Judge. Juror no. 1 has an ill family member, and so she -- and she had alerted me to that fact. I think I mentioned it to you.

Mr. Panish. You did.

Mr. Putnam. Yes.

Ms. Bina. You did, your honor.

Mr. Panish. You told us.

Judge. She decided to come that one day to court to finish up the week.

Mr. Panish. Right.

Judge. And then during the weekend, I think she communicated with the staff and said that she was going to visit the sick family member. A pretty serious illness. And she asked my staff to communicate with me whether or not she would be permitted to leave and still remain on the case, and my response was, "yes." and I didn't contact you because it was the weekend. I made the decision. But that's not to say that I don't want your input. Certainly, things can change, and we can talk about that, but that's what happened. And so what that would mean is that this week, since there's only two days, we would be off this week. I know that means more juggling of witnesses god knows how many times. I know I asked you to juggle your witnesses, and I feel really bad about that, but that's kind of where we are.

Mr. Panish. Did she indicate she would be gone for the week? Is that what she said?

Judge. Yes.

Mr. Panish. She said, "if I leave for the week, will I be off the case?" and --

Judge. Right. Which is only two days of court.

Mr. Panish. Right. I understand that. Is it known that she would be back on Monday --

Judge. That's what she said.

Mr. Panish. -- or is it up in the air?

Judge. No. She said she would be back. She has specific travel plans that indicates she would be back.

Mr. Panish. Oh, I see. Is this --

Judge. If she's not at that point, I think we should put somebody in if she's not back.

Mr. Panish. Is this situation, is it the type of situation that could turn to be --

Judge. It could turn to the worse. It could. And if it does, then I think we just go on and substitute somebody. I mean, I don't think, if she's not here on Monday --

Mr. Panish. Is she going to report back, like, later in the week how it's going or anything?

Judge. You know, I don't know. I'll ask my staff.

The clerk. she was going to e-mail us by Friday to let us know what her status is.

Ms. Bina. So we will know by then whether she needs to be replaced or hopefully come back on Monday.

Mr. Panish. So now the court's inclination would be to not have any witnesses this week, and then to carry over -- I know that's something we need to talk about, but to carry over whatever is going to happen to the 16th?

Judge. Right.

Mr. Panish. And I don't remember, but I think that --

Mr. Putnam. We have two half days, but otherwise we have five days that week.

Mr. Panish. Well, let me just look at that. So the 16th, we have a --

Ms. Bina. Full day.

Mr. Panish. Full day, 16 and 17; 18, half day, 20.

Ms. Bina. Full day, 19th.

Mr. Putnam. So we're here every day.

Mr. Panish. So is it the defense position that it's okay?

Mr. Putnam. Oh, absolutely. I mean, I think that a number of people have taken a day off here and day off there. She's not one of them.

Mr. Panish. Okay. We're not going to raise a problem with that.

Judge. She's been fine.

Ms. Bina. It's an unfortunate situation, and it might turn into a place where we have to do something. But as it is, we should all try to -- they've been together a long time, and five months is a really long time. Don't like to lose anybody.

Mr. Panish. So with that, the plaintiffs are okay with the court's inclination.

Judge. Okay. So I hope for her sake --

Mr. Putnam. Absolutely.

Judge. It's a serious illness, one of those that comes on quite quickly and could be deadly. It's that serious.

Mr. Panish. Right. And it's a very close mother-in-law situation. So okay.

Judge. Okay.

Mr. Panish. So that kind of --

Judge. I know that means you have to do a lot of juggling.

Mr. Panish. No. It's okay. It's just that it -- okay. Anyway, no problem.

Judge. And you have other trials, is that what you're --

Ms. Chang. Yeah, I do, but, I mean --

Mr. Putnam. Only two days.

Mr. Panish. I mean, it's something that I'll deal with, and that's what's going to happen.

Judge. I'm sure everyone --

Mr. Panish. Everyone has things to do, I'm sure.

Mr. Putnam. Also give us this opportunity, your honor -- we were racing to the end. We will be -- almost, without exception, I see our resting next Monday, then, and therefore, what it does give us all is the opportunity to prepare for closing and everything else over the next couple of days. Gives us the opportunity to go through jury instructions and the like.

Ms. Chang. And the verdict form as well.

Mr. Putnam. I would even argue, your honor -- we are prepared for all of that, so don't misinterpret, but if for any reason, in light of the fact that we would now have Wednesday and Thursday, if you would like time to go through them in more detail, because I know you were obviously going through the nonsuit materials, so we can argue them tomorrow or the next day, if it would behoove the court to do it, instead of today. We obviously now have those days, and we were going to be here anyway. So whatever is better for the court we're happy to do?

Mr. Panish. Can I make an agenda, and then we can decide how to proceed?

Judge. Well, I would prefer to do the jury instructions and the verdict form tomorrow. I don't want to do it all today.

Mr. Putnam. Let's do that.

Judge. You can talk to each other. Basically, my week is free if you want to get together and say, "judge, this is what we propose, this is when we have availability," then that's fine, because I'll be here, certainly, all day, so it's really up to you.

Mr. Panish. Can I just make a suggestion; okay? What I understand are the issues outstanding are: the nonsuit motion; the Shimelman issue, which they filed a new brief on that; statement of damages issue; witnesses that defense is going to call in rebuttal -- I mean, in the rest of their case.

Mr. Putnam. I'm not sure that's not an issue.

Mr. Panish. Well, it is an issue, because, according to what I got today, there's five witnesses, depending on orders, and it's not clear. So --

Ms. Bina. And that's actually correct. Some of your court's ruling on these various matters may affect, for instance, whether we call the plaintiff Katherine Jackson, and a few other folks. And that's what we put in our e-mail to plaintiffs this morning.

Mr. Panish. Well, and that's what I wanted to discuss. So it is an issue. Then we have the Caci instructions, we have the special instructions, and we have the verdict form.

Ms. Bina. Also, the Faye texts.

Mr. Panish. And the Faye texts.

Ms. Chang. And there's one more. We both forgot. I was going over the transcripts, and at the time of Taj Jackson's testimony --

Ms. Bina. We're putting that in today.

Ms. Chang. There was supposed to be briefs on the --

Mr. Panish. Handwritten notes.

Ms. Chang. -- the notes what we can argue at the closing.

Ms. Bina. And we remembered it, your honor, and that brief is coming in midday today.

Mr. Panish. And then we have --

Ms. Chang. And, your honor, we'll do a counter-brief, I guess, by Wednesday. Is that okay?

Judge. Okay. That's fine. I don't even remember that issue.

Ms. Chang. It's just something that has to be resolved before closing.

Ms. Bina. Right. They can argue which ones are admissible and not admissible. Kind of going through them by class.

Mr. Putnam. And we have a brief all ready, your honor.

Mr. Panish. And then we have the issue on the defendants' motion on the medical records, also, which is still outstanding.

Ms. Bina. Yeah. That's correct.

Mr. Panish. So have I listed off everything that's -- Marvin, is there anything else that we're missing? So we got a number of issues. So what I would propose --

Ms. Bina. Actually, there is one other issue.

Mr. Panish. Okay. Go ahead.

Ms. Bina. It relates to the "This Is It" movie, your honor. Throughout the trial, both sides have treated that as though it was an exhibit. Actually stated on the record several times it was admitted. However, the plaintiffs informed us that their position is only the clips that had already been shown are admitted. If that's the case, we need to call an additional witness and show additional clips so we have the opportunity to use them. My understanding is it's been referred to the entire time as the entire movie was in evidence. The entire movie was authenticated, so I'm not sure what the issue is, but that's another issue.

Mr. Panish. I missed the --

Ms. Chang. "This Is It."

Mr. Boyle. Brian, I can handle it.

Mr. Panish. We don't have to deal with it right now.

Mr. Boyle. And let us look back to the transcripts at whatever was said about "This Is It." I think that is -- this was a conversation between the people from both of our offices who were working on exhibits.

Ms. Bina. Yeah.

Mr. Boyle. So let me look.

Ms. Bina. And Mr. Putnam and Mr. Panish referred on the record as to the movie being in evidence.

Mr. Putnam. We have all those cites for you.

Mr. Boyle. Okay.

Mr. Putnam. We can work it out.

Ms. Bina. I was surprised to find that it was not.

Ms. Chang. Can we also work out -- the same thing goes for us. We have a lot of clips of videos, like "ghost" that we only showed it, a little bit, but the whole thing is really --

Mr. Putnam. Why don't we talk about that? Because there are certain ones -- for example, the photograph that's constantly shown but not authenticated, but --

Mr. Panish. Which photograph?

Mr. Putnam. The one on the 19th.

Mr. Panish. That's in.

Mr. Putnam. But, anyway, we'll go over those things.

Mr. Panish. That's in evidence.

Judge. That's part of another thing, is you do need to go through the exhibits.

Mr. Panish. We have.

Ms. Bina. And we've been working on that with the staff and your clerk. That is being done. And that's how the issue arose about the movie in the first instance.

Judge. I mean, this can take up a full week.

Mr. Putnam. Actually, so look at this as fortuitous.

Mr. Panish. We have four days. Is somebody going to call the jurors and tell them not to come?

Judge. Yes.

Ms. Bina. So I guess we should figure out what order we want to go through these.

Mr. Panish. I think we should do the nonsuit stuff now, since it's fresh.

Ms. Bina. I completely agree, because there's nine other things.

Ms. Chang. Karen Faye and damages.

Judge. Those are in the forefront.

Mr. Panish. And want to do those three now?

Judge. Today, yes.

Mr. Boyle. And, your honor, just so you know, for jury instructions, and so the defense knows, we have a -- sort of a responsive set to their set that we're going to file today, and we'll e-mail it to them so they have it.

Ms. Bina. In that case, I might suggest we just deal with them on Wednesday. So that gives both sides an opportunity to review each other's submission, and maybe we can agree on something.

Mr. Panish. Well, the Caci ones --

Ms. Chang. It's up to the judge.

Judge. I think you should meet and confer. There are generic ones you can agree on.

Ms. Bina. There are some.

Mr. Panish. What I would say is the way it normally is, the set of Caci that are agreed upon in one stack; the ones that plaintiffs proposed and defense objects to, another stack; the one defense proposes, plaintiffs reject, another stack on the Caci, and the special. So I think at least we'll have it down to three stacks that we can work from.

Ms. Bina. We, also, might be able to sort it by subject. For instance, if we propose one contract special, and you have an alternative contract special. But we'll figure out an order that makes sense for the court to review jury instructions.

Mr. Panish. It would be good to give it to the court before we come in.

Ms. Bina. Yeah. We can work with that.

Judge. Oh, yes. Don't want to sit here and --

Mr. Panish. Right.

Ms. Bina. Kevin, when are you putting in your responsive stuff? Is it coming in today?

Mr. Boyle. Oh, yeah.

Judge. Or you can meet -- I mean, if you need to be here in my jury room, that's fine. I don't want to have to supervise you going through it.

Mr. Boyle. I have it --

Ms. Bina. I think we could just literally take the two submissions, put them in piles for the court if we can agree on the piles.

Mr. Boyle. Here's the thing, your honor. I don't think we are going to be able to agree. I'm not trying to pre-argue. I mean, based on what they've put in, I think they're going to, for the record, need to stick with what they've put in, and we're not going to be able to agree on it. So we're -- it's probably going to take court time to --

Mr. Panish. The Caci --

Ms. Bina. I'm talking about agreeing on the piles to present the issues to the court. That's what we are talking about. And I suspect we won't be able to agree on some of the instructions.

Mr. Boyle. I'm with you. But the problem is, not all the cases, but a lot of the cases they've submitted, they've added to the Caci.

Judge. Modifications. I've looked at them.

Mr. Boyle. Yeah. Okay. I think it will take court time. So whenever we start is fine. We weren't necessarily going to file big objections to pleadings together. We just thought we would go through special ones orally in court. I don't know how else --

Ms. Bina. Well, I guess, how about this: you let us know your position on each of ours. Are you still proposing the three specials you proposed originally or do you have additional ones?

Ms. Chang. We have additional ones.

Ms. Bina. All right. So if you guys are filing your additional specials today, I'll let you know our position on them; you can let us know your position on them, and then let's try to come up with a way for the court to go through it tomorrow. And then maybe we can -- we'll let the court know

that. Either give the court something, or give the court a list, the order we think makes sense to go through them, some kind of order for the court. And then go through the instructions and verdict form on Wednesday.

Mr. Boyle. I think that makes more sense.

Judge. So still Wednesday.

Ms. Bina. Again, I'm sure there will be some disagreement, but --

Mr. Boyle. Tee it up.

Ms. Bina. Get some order on the chaos.

Mr. Panish. Probably some Caci --

Mr. Boyle. There are some.

Judge. There are some generic --

Ms. Bina. I think about half the instructions, certainly, the introductory --

Mr. Panish. Well, all those 100s, and all those you've already given.

Ms. Bina. And the 5,000s.

Mr. Panish. The 5,000, we have to have those.

Ms. Bina. Right. But they're largely agreed on. I mean, there are some differences, but largely agreed on.

Mr. Boyle. Going through the defense, they have 17 specials, and there's about five Caci that we think are improper modifications. And so we'll probably have about five specials of our own. So that's about the number we're dealing with.

Mr. Panish. So about 30 instructions.

Judge. Okay. That's all right. Be that as it may, but I think you should take a pass at it.

Ms. Bina. We'll make an attempt, your honor, and once we get theirs, we'll try to meet and confer.

Mr. Panish. All right.

Judge. Okay. Let's start with our motion.

Mr. Putnam. All right, your honor. Just very quickly, because obviously this is an issue --

Judge. It's your motion.

Mr. Putnam. It's my motion. And it's something that we've obviously in some form or another have been arguing in various forms for months now, so I'm not going to go through all of it. I think your honor has a great familiarity with the law. I'd like to address certain specific issues, if I may, your honor. And I do think, your honor, with all due respect, I think there are certain mistakes of law and fact in here that I think it's important to point out, for the court's benefit, but I think it's fairly important for the record.

The most important is as to the law, your honor. I have to say, I think this holding is specifically contrary to all California law. There's nothing that's ever done with this case that does. There's no other cases that has ever, in a negligent hiring, supervision or retention case, said that absent red flags, without red flags, with no specific conduct, nonetheless, because of the totality of circumstances, there's -- nonetheless, that that had provided notice. And when I was reading it -- and, literally, I'm reading it. I was trying to get to the point of, how did they get there? How did

the court get there? I really don't understand. And as you can imagine, we have exhaustively gone through all California law. We went through the country, because we had time. Has this ever been done? And so we went through everything and couldn't find anything that did that. I'm reading through, and I got to page 14 and found out how that happened. How it is that we got to this kind of totality of circumstances.

And on 14, it says: "substantial evidence has been presented at trial from which a jury can reasonably infer that the defendants knew or should have known that Dr. Murray presented an undue risk of harm to decedent." it then goes on to cite *Federico*, and here's the quote: "*the employee's past need not raise any red flag to the employer, and foreseeability may be inferred based on other factors and circumstances unique to the employment.*" and that really is the crux of the decision. Crux of the decision rests on that idea; that you don't have to look at a red flag that's about the employee; you can instead look at other factors about the employment.

And I was like -- I looked at it, and I almost want to show you my exact thing on the side here that's -- "*I don't remember that.*" so I went in to figure out how we could have missed such a major idea; right? And I'm in some measure happy to say we didn't. Where you got that from, your honor, and you say here you got that from plaintiffs' opposition at 1125 to 27 citing *Federico*. And, yes, they do say that in their opposition, but what they relied upon, *Federico* says no such thing. Says nothing even close. And I will go in to show you what it actually says in one moment, your honor. But I think it's really important, because the crux of the whole decision has to rest on that. Because it is where the court says in the order, you know what? No. I'm going to look at the totality of the circumstances, it's not about the employee. It's not about Dr. Murray, but everything else about what we're talking about here. Specifically, Michael Jackson. And I'll get to what you say after this on page 16 about that. But in *Federico*, what it actually says, and what every California court says and every court nationally, I think, except for Kentucky, which has no rulings on it, is this idea, your honor: "as we have previously explained" -- this is what *Federico* actually says at that line -- "rather, as we have previously explained, liability for negligence can be imposed only when the employer knows or should have known that the employee" -- that the employee -- "because of past behavior or other factors" -- by the "employee," that's modifying the employee -- "is unfit for the specific task to be performed." all of the cases talk about that idea.

What is it about the employee? Is it something that you knew or could have known? And if you go through the cases, I mean, *Federico* is a perfect example, your honor. *Federico* is a case, as you recall, where the hair stylist trainee, trainer, the person training all the various people at the beauty school, ended up assaulting one of the persons who came in, their child, a minor child. And in that case in *Federico*, the employer knew about the employee's past. In fact, knew that he

had gone to jail -- he had gone to jail twice on this. He knew of one and probably knew of the second.

That was in dispute. And knew of the first because he had to leave his actual employment with this very same hair styling entity to go to jail for it, goes through and talks about all these very specific red flags, had a long discussion of the red flags, and then the court says, "nonetheless, the nexus isn't tight enough." "nexus isn't tight enough to go there." it's all about the employer and the employee, and what the employer knew about the employee, not about the circumstances, but about the actual employee. Because otherwise, if we were to go into where the court has gone here because of its reliance on what the plaintiffs said *Federico* stood for, which it doesn't, we would have a situation which would mean no doctor here could have been hired. None. Regardless. Because it's not about the doctor. And here there was nothing about the doctor the court relied upon rightly, I believe, for this finding. In fact, the court goes on to say --

Judge. You're saying no doctor could have been hired?

Mr. Putnam. Well, if I take the reasoning of the court here, which talks about two things: the decedent dependency issue -- meaning Michael Jackson had dependency issues -- and the defendants' unusual relationship with Dr. Murray. Okay. And I think what you're talking about there is the idea that there's a contract --

Judge. The conflict.

Mr. Putnam. -- Between two parties -- this idea of a conflict. But a little side that I was going to get to at the end as a policy measure. On this conflict issue, I know of no law that has ever been created anywhere, and I was looking for that -- and I'm not going to pretend, like the other, we've looked everywhere for it, because I haven't, so I won't represent that -- but this idea that providing a motive to commit a crime, you're therefore negligent because you somehow provided a motive to commit a crime, they then committed a crime, and you're negligent for it.

I can go through horrible examples if you ask for it, okay, but I don't know of anything that does that. And I don't know how you could in that way because that would be a horrible public policy decision here, your honor. In fact, if you look at the public policy decisions in all of these says, since we have read them all, it talks a lot about public policy.

And I often think of public policy as the last argument you're going to make because you're not going to win on anything else, but in this instance, it's not that, because the very idea has created a public policy. And this area of law, this idea that you can have a negligent hiring tort, is something obviously that didn't exist back in common law. That is something that has developed very gradually and very slowly over time. We went over and looked at all the histories and the case notes and the law journal articles about where did this come from. And it came from this very basic idea, first, that you wanted to protect one of your own employees against another one of your employees. That's what it largely arose out of.

Judge. I saw something --

Mr. Putnam. There's a footnote about that. It's in there. The idea has a weird term of "serpent's liability" or --

Judge. Oh, yes.

Mr. Putnam. You remember that? And very gradually, and only quite recently, did this develop a little bit further, which would take it out of the employment context, I.E., at work, and say if we're going to go to a third party --

Judge. Right.

Mr. Putnam. -- We're going to do it super narrowly. It has to be really narrow, but it's all public policy driven. And only in those extreme circumstances where the nexus is so close that you knew or should have known better, which is why that nexus idea is so narrow, because you want to look at it and say, but this you absolutely should not have done, which is why in *Federico*, they go through all of them. You've seen them all. We've done all of these cases. *Federico*, the doe case, that horrible sexual abuse -- assault case. And you'll note what the court said in that case, it took all the red flags as true.

So the idea, it was a casting couch. And everyone knows how the casting couch is used. Every time I read that case, I think it's so similar to ours in the idea to talk about rock docs. "everyone knows about rock docs." "everybody knows about a casting couch." with this guy, they have the idea that this casting agent at -- I think it was abc, "cab city." so it was abc talks about the idea that he had a history of using his position for sexual advances with people who would come in;

of abusing drugs. All of these things they said were true, they accepted as red flags, but, nonetheless, doesn't go to the nexus of therefore committing a crime. And that is the same as here. Even if you accepted all these things as true, that doesn't then go to the very nexus that he would therefore commit a crime.

Judge. He's not being prosecuted here.

Mr. Putnam. What he did was a criminal act.

Judge. Right. But it's also a tort.

Mr. Putnam. But that was also true in *doe*. That was not a criminal action, your honor. That was the idea of going for, exactly like here, a negligent hiring and whatnot. And then -- because otherwise -- a criminal act had already been prosecuted, which was against this guy and a couple -- the other three men that were involved in that case, there were four in total -- and went into that and very specifically said, "no, you can't" -- that all is proper criminally, but you can't get back to "cab city, USA" with this. And I think the same is true here through -- because of public policy reasons. But if I -- moving back to what the argument is, your honor, so what this does, which has never been done before, ever been done before, is without red flags about the employee, it is saying, rather, because of things about the person who was ultimately harmed -- here, Michael Jackson -- things you should know about the totality of circumstances, that is what provided the notice requirement.

Judge. But isn't it known or should have known, not just what you knew?

Mr. Putnam. Absolutely.

Judge. So should have known indicates that you didn't know, but you should have known.

Mr. Putnam. About the employee. And what is it here that they should have known about the employee that provides that narrow nexus? The decision, as I said, your honor, as drafted doesn't do that. Rather, it does -- relies -- I'm sorry, incorrectly -- on what the court was provided by the plaintiffs wrongly that *Federico* does not do. Now, if *Federico* did that, okay, we would be in a different situation. I understand that. Because then you would have something more like totality

of circumstances. But *Federico* doesn't do that. And in fact, the second quote in here, your honor, this idea of "foreseeability may be inferred based on other factors and circumstances unique to employment," I mean, that's what this decision now does. But no negligent hiring case in California has ever done that, nor have I found one anywhere that has. In fact, that quote, second quote, isn't from *Federico*, your honor. It's from a premises-liability case, which your honor has even noted --

Judge. Yes.

Mr. Putnam. -- is a completely other area of law that doesn't have the necessary parallels to apply here. You were provided something as a basis for your opinion that doesn't exist. And in fact, all the things that we have in this state are absolutely contrary to this. And I just really want to emphasize that, your honor. Because one of those things I was thinking about a lot, not only before bringing this motion, but in preparing to argue for however it came out is, we are a long way down into the trial. We've all been here a very long time. And do I really want a nonsuit? I mean, you really have to think about that.

Do I want a nonsuit at this point, because if it were wrong to provide a nonsuit in this case -- I have no idea if it would turn on appeal or something. But we're so close to going to the jury. I'm even further convinced, having gone back now and reading all of the case law -- and I did read all of the case law, which I don't always do -- I really think it would be inappropriate here for this to go to a jury. That is not what the California law is in this matter. We don't have a totality of circumstances idea. If we had a totality of circumstances idea, that would be so grossly inflated, what that little narrow nexus is, that it would blow it up to a position to where, for example, in this instance, no doctor could be hired. And that can't be what we're looking at, your honor, and that can't be what -- and the law certainly has never provided it before now. And *Mendoza*, I just want to use for an example. I know it's a different idea, goes to causation, not notice. But *Mendoza* provides an important idea here. That I think goes to this idea of, why you don't give it to a jury in this instance? And that's because of the apportionment of any liability. And *Mendoza*, as you might recall, is an instance -- a causation case where the man had worked for the -- he was a policeman, and then he went out drinking --

Judge. The shot-the-girlfriend case?

Mr. Putnam. Exactly. And shot his girlfriend, and the child was there. Their child as well as her prior child. And just like most of these cases, it was a guardian ad litem case that was brought for wrongful death and whatnot. And I think really important in that case, like in this case, in terms

of causation, there's this idea that they already had a relationship. And the reason this law exists - - and I'm going to argue causation just minimally.

The reason this law exists, your honor, is to ensure that employers do not take somebody that they should have notice could be a problem for you and put them in your path. That's what it's about. And it tends to be in situations where, because you will come into the hair dressing salon, or you will come into the supermarket, or you will, somehow while the policeman is on duty, be confronted by this policeman. The idea is, you don't want that to happen. And so you go into "but for now" is the causation, and proximate cause, and you go into those. I think what "Mendoza" does beautifully is look at the case that the court decides is wrongly allowed to go to a jury. The jury largely determines that this was not the police force's -- the city's fault, but, nonetheless, did give them 25 percent liability.

Judge. Who was 25 percent?

Mr. Putnam. The police. In other words, 75 percent of it is wrong. And that's why it's so important not to go to a jury. Because they have the ability to say 10 percent is there. If they had only not done -- what happened in *Mendoza*, what happened is, there were red flags. He had done various personality tests. He scored 26 or 28 on the scale, and that showed a propensity for a certain violent behavior, which they didn't follow that up. There was also one where they were required to do background checks with references, and they actually didn't follow up on them. And if they had, they could have found out various things about him, for example, his propensity for drinking in the navy and how he became violent, et cetera. These various red flags existed.

Judge. That sounds familiar. Should have done background checks to determine --

Mr. Putnam. That's why I'm saying that. They say all of those things, it ended up going to the jury, and 25 percent goes to the city. But the court of appeal came back and said, "no. This is precisely the kind of thing that shouldn't go to the jury because of the emotions of it, because they could give a small percentage to the city."

Judge. Because of the emotion of it?

Mr. Putnam. Well, yes. These are very emotional matters, your honor. They're wrongful-death cases and, therefore, things can be decided on matters of emotions as opposed to the facts.

Judge. Okay.

Mr. Putnam. And that's why the gatekeeping function of the court is so important here. And, therefore, the causation, the court of appeal decided, in overturning the matter, was saying causation didn't exist there, because even though these red flags, and even these various "but fors" existed, "but for his employment, this may not have occurred." unlucky because of their prior relationship. The city didn't put him, as a policeman, into her path. They already had something, which was going on, which I believe, your honor, is very akin to here, because our determination that we would take on payment; that we would ultimately decide to pay for the doctor that he already had working for him, that very same idea, coming in to pay later in the process, doesn't change the causation in the same way with *Mendoza*. But what's important, the reason I brought it up in terms of what we're talking about, is the 25 percent idea. This idea of what is important about things like notice. Because if we don't use our gatekeeping function here, and this thing does go to the jury when it shouldn't, then you run a very real risk of even a nominal percentage being applied, and that's something I don't think would be appropriate here. So that's the law that I think the *Federico* portion is incorrect, your honor --

Judge. Okay.

Mr. Putnam. -- that needs to be addressed. And then, also, quickly, I want to know that under the public policy aspect, the big thing that I've been worrying about where I say, change in public policy with this idea, this opinion now, your honor, is because of the idea we have in California that: "a physician must be licensed by the state in which he practices, and if the state authorities are satisfied of his competency, the defendant should not be required to assume the contrary, unless the fact is brought to its attention. There is no law to the contrary." this idea that we're allowed to presume a doctor, a properly-licensed doctor is fit, and unless there's a notice that is provided about the doctor, unless there's something that you knew or should have known, not a totality of circumstances, but about the doctor, then this utterly changes public policy and how we deal with it, which is really important, your honor, in terms of the idea of conflict of interest. Because as the *A.M.A.* Requires, a conflict of interest is something rightly determined and managed by the doctor. I mean, that's the person who usually deals with the conflicts of interest, the person who has the conflict. You have to manage in some way, figure out what you're supposed to do with it. And the *A.M.A.* Says, it's the doctor who is supposed to deal with it. Same with a lawyer. A lawyer has to deal with it. That's what your ethical and legal requirements are. I think the same is true. Now, in terms of the other facts, I said there are other facts, your honor, I wanted to address quickly, I think that aren't right as they are in the record. And if I could do it very quickly for the sake of the record here today. On page 13, your honor, it says that "Bugz

Houghdahl was an AEG Live employee." he was not an employee, your honor. And in fact, the only evidence in the record shows that he was an independent contractor.

Judge. Okay.

Mr. Putnam. Similarly, the bottom of 13 --

Judge. Most of the people were independent contractors.

Mr. Putnam. Exactly. So I think that's important, your honor.

Judge. Okay.

Mr. Putnam. At the bottom of page 13, and going on to page 15, the court suggests that AEG Live and Shawn Trell --

Judge. Where are you?

Mr. Putnam. Sorry. The end of 13.

Judge. Oh, yes.

Mr. Putnam. Going on. And it talks about the idea --

Judge. Yes.

Mr. Putnam. -- About AEG Live and Shawn Trell --

Judge. Yes.

Mr. Putnam. -- were in negotiations "without consulting with the decedent or anyone on his behalf."

Judge. Yes.

Mr. Putnam. Again, I don't think that's quite consistent with the record, your honor. I know they tried to make the argument, but if you recall, we put in the declaration of Frank Dileo, Michael's manager at the time, and he stated that --

Judge. You put in his declaration in the trial?

Mr. Putnam. At trial, yes.

Ms. Bina. It was admitted as evidence, your honor, without objection and discussed and presented to the jury.

Mr. Panish. I actually did object on hearsay.

Mr. Putnam. No. Actually, you didn't. We checked the record before we came today.

Judge. All right.

Mr. Putnam. And Mr. Dileo had that declaration that said that Mr. Jackson had specifically asked AEG Live to hire Dr. Murray on his behalf. That's his manager.

Judge. Okay.

Mr. Putnam. You may also remember that Mr. Dileo was the one who asked Randy Phillips at the forum, I believe it was, your honor. It was "his manager specifically asked Randy Phillips to intercede, saying, 'I've been unable to convince Mr. Jackson not to hire and bring Dr. Conrad Murray.'"

Judge. I'm sorry. Who was asked?

Mr. Putnam. Frank Dileo, the manager --

Judge. Yes.

Mr. Putnam. -- Approached Randy Phillips, when he came back from the trip --

Judge. This is according to Randy Phillips?

Mr. Putnam. Yes. At the forum. And there's no contrary evidence. And so it says: "hi. I've been trying to convince Michael not to bring his doctor on tour, to get somebody in London, and I have been unable to do it." this is Michael's manager. "Could you give it one more try? Could you try one more time to talk to him and say, 'don't bring him along?'"

Judge. Dileo says that to --

Mr. Putnam. Randy Phillips.

Judge. Okay.

Mr. Putnam. Again, it's showing that -- only goes to the very specific point you have at the end of 13 and 14 that his management or people were unaware of this.

Judge. I think the idea, though, at least what I had in mind here, was the written negotiations. When it came down to putting things in writing, the writings were not exchanged.

Mr. Putnam. The written contract. What it says is they had not yet received it. If you recall, your honor, what the testimony says is that it would be sent to them once finalized between those two parties. And not that they didn't know at all but -- not that Michael's management team didn't know that he was being considered for such a position.

Ms. Bina. And just briefly, your honor, if you recall, Mr. Dileo was actually present at the meeting with AEG Live and actually called Dr. Murray on his own. So it's just -- the sentence as written is somewhat misleading.

Mr. Putnam. As if Dr. Conrad Murray was acting out there with Michael Jackson's management team not knowing anything about that, and that's not the case.

Judge. Okay. Well, okay.

Mr. Putnam. And then --

Judge. I can try to make it clear, but --

Mr. Putnam. Okay.

Judge. -- The document was not sent -- the written document --

Mr. Putnam. That is absolutely right.

Judge. -- was not sent to any of Jackson's people.

Mr. Putnam. Absolutely right.

Judge. That's what I was trying to make clear.

Mr. Putnam. We can put it in or --

Judge. I'll tweak that one.

Mr. Putnam. And, also, on page 13, your honor, the court said, "*it's an important fact that Mr. Phillips had acknowledged that he was 'not sure how effective Dr. Murray can be at this point.'*" you see that on 13?

Judge. Yes.

Mr. Putnam. All right. And I would ask, your honor, that a very important part of that sentence is left out that makes clear what he was talking about. And the plaintiffs have done this repeatedly, cutting it in half so it was actually taken out of context. The entire sentence, your honor, is: "*he is not a psychiatrist, so I am not sure how effective he can be at this point.*" the import being, "*I think he needs a psychiatrist at this point.*" it's not a question of his being unfit in some way for the general practice of medicine, which is something quite different, I believe, your honor.

Judge. Okay.

Mr. Putnam. Okay. And that's what I wanted to raise. But, again, your honor, in short, and I think most importantly, the very premise on which this is based is what plaintiffs provided you about *Federico* and is not the law in California at all. In fact, it's not the law in any of our 50 states. And as a result of that misapprehension and misapplication of this, what occurs is we now change California law entirely for the first time, and I don't think this is the case to do that in, your honor.

(SIDENOTE:- NOTICE PAGE15-26 Mr Panish spoke once, did not interrupt defense. Go back and read the 11 pages again. Now notice below how many times Mr Putnam butts in and how disrespectful he is to Mr. Panish. This has been the pattern with both Sabrina Stong & Marvin Putnam, and the Judge allowing it)

Ms. Chang. Your honor, just briefly. We're all very familiar with both Mr. Putnam's arguments and the law, as not only what it raised before here, but also up through the appellate court, which found that this should be submitted to the jury; that there is a jury question. This does fit squarely within California law. And the reason why *Federico* -- and it doesn't fit *squarely with Federico* and *Mendoza* in Mr. Putnam's eyes, is because those facts are so different from the facts presented in this case.

Those two cases dealt with factual situations in which the bad acts occurred outside of the intended employment. The casting couch was not at abc studios, it was at his personal house, and all sorts of activities went over in that house. With respect to *Mendoza*, it was an off-duty police

officer who used his own private gun, and not the one issued by the police department, to shoot his girlfriend at home and outside when he was off duty.

Those are very different than the factual situations found here, as your honor noted, that the bad acts occurred directly related and during the course of the employment relationship. With respect to the case law, the case that -- the portion that Mr. Putnam read on *Federico* is exactly what we cited in our brief and the other factors, and I think that we will otherwise just submit on the tentative. In this case, they should have known about the prescription pad danger with the doctor, and they then created a further risk by creating a conflict. With respect to the facts that are listed on page 13 and 15, I believe your honor was merely listing the facts in favor of the plaintiffs, as your honor must, and in fact, every single citation to these facts have attached transcripts where the exact statements alleged were stated.

So there are facts with respect to everything on page 13 and everything with respect to on page 15. And with respect to Frank Dileo, I don't want to argue or belabor this, because it has nothing to do with the bottom end of how the decision should be rendered, but Frank Dileo came in afterwards with Tohme. His -- what came out in evidence, and we'll show it later, is that his documentation to represent him in this tour on a limited basis wasn't even signed yet.

They did get a declaration from him, and the reason why there was no objection was because the declaration was merely to approve the budget post-death, which included Dr. Murray in the production costs. So therefore it helps us and not hurts us. In no way did Frank Dileo state in that declaration that he was part of the negotiation or that he even knew about it at the time he came on. It was a done deal. And with respect to the negotiation, your honor is exactly right.

The problem with that document is that it was between Dr. Murray, and it was between AEG's lawyers, and each drafting of that created this unholy trinity which we say led to the pressure and led to the death. With respect to the remainder of -- we would like to submit on the tentative with respect to AEG And now I'm going to raise what I believe are further arguments with respect to your honor's tentative on the individuals Paul Gongaware and Randy Phillips. We agree, your honor, that this is a situation in which the case law is not clear. And we submit, your honor --

Judge. Tough to wade through.

Ms. Chang. Yes. And when the case law is not clear, your honor, we submit that the case should go to the jury. And in this case particularly, there's a reason why. This case is more like *Frances T. Vs. Village Green Owners* than any of the other cases, because in this case, we don't have two individuals that are merely acting in the course and scope as producers. There -- if we were, I would agree with everything your honor came out with. In this case, there is substantial evidence that there was in fact lies and deceit that, by his own admission, what Mr. Phillips told Kenny Ortega was not true. Kenny Ortega was slow on the train and getting the train derailed from the

tracks. He was a problem. He had to be stopped. And at that meeting, when he called Dr. Murray first, and when he warned him himself, "**Kenny, don't be an amateur psychiatrist. Enough fire bells had rang,**" or whatever, "**I've gotten to know the doctor. He's ethical. He's successful.**" that was an out-and-out lie, and that was for an ulterior motive, not for the best interests of Michael Jackson.

Judge. Is it for his own benefit that he did that?

Mr. Putnam. No.

Judge. He did it for the benefit of AEG Live, and what he had to do in connection with getting this tour on the road.

Ms. Chang. My point is, your honor, is that it's misconduct. It's a level of misconduct that goes beyond. And if I could just state more the malfeasance, the lies, he distorted the truth, and he directed Conrad Murray more than he should. And the most important evidence, I think, is the evidence submitted by Kai Chase and Prince Jackson. And that is, a discussion that took place after Michael Jackson left the room that caused Conrad Murray to say, "**I can't take this shit**" and to leave the room. And then to be there two nights, a night before, not clear when, shortly before Mr. Jackson's death, at night, in the house, with Dr. Murray, without Michael Jackson, whispering, and it looked aggressive, and he was grabbing his arm. All those things, the totality, takes this out of the normal, "oh, I'm an agent or a director of the corporation. I'm innocent." this is absolute direct acts by directors. And I think that is squarely exactly the facts of *Frances T. Vs. Village Green Owners Association*. In those cases, the directors had specific knowledge; they acted specifically, and the court said, "look. Directors aren't subordinate agents. Their role is, as their title suggests, they're policy makers who direct and ultimately control corporate conduct." in this case, the two people that controlled everything that was done here, the good and the bad and the ugly, was Paul Gongaware, and, especially, Randy Phillips. So I believe that those two take it out of that context. And I think that because of the standard that we have here, because we've been in this trial for so long, the prudent thing is, since it's close, and it's unclear, and because these are directors, and they have had this long history, we have two options here: one is, let it go to the jury; number two, as we continue to present our evidence -- as you know, we have this whole issue of reopening rebuttal or whatever -- we have the right under a nonsuit to reopen to add more evidence on this issue if we have to.

Judge. Well, technically, this should have been heard earlier.

Mr. Putnam. And, technically, that motion could have been --

Mr. Panish. I'm sorry? I didn't --

Ms. Chang. We still have the right to reopen, your honor.

Mr. Panish. That's true.

Ms. Chang. So we'd still be in the same position.

Judge. I don't know about the "right," but you have the right to move the court to reopen.

Mr. Putnam. That's exactly right.

Ms. Chang. The case law is clear, your honor, and I cited it in our brief. We have the right.

Judge. Okay.

Ms. Chang. That's the difference between a directed verdict and a nonsuit. And that's one of the distinct differences is that plaintiffs have the right, and they must be given the opportunity -- yes, go ahead.

Mr. Panish. Could I address this briefly, your honor? Mr. Phillips was quoted in the newspaper and admitted about this 800-pound gorilla there at Livenation. Mr. Phillips had a financial incentive for his own personal benefit for bonuses and performance bonuses based on how the concert business was going. Mr. Phillips testified that Michael Jackson was, as he called it, bringing Mohammed -- the mountain to Mohammed. This was going to enhance his personal reputation as a promoter. Also, the fact that Michael Jackson, if he didn't make it, it was going to be very harmful to Mr. Phillips's reputation personally because he had gone out and promoted this and made all these statements. So he had a personal motive. Mr. Phillips also knew of the history that Michael Jackson had with painkillers. Mr. Phillips knew of the danger of using a physician with a conflict of interest because he wrote, "this doctor is successful" --

Judge. He checked everyone out, he's ethical, unbiased.

Mr. Panish. Which kind of recognizes --

Judge. I know it.

Mr. Putnam. You do.

Judge. Heard it over and over.

Mr. Panish. I know. But the reverse of that is, if they do need the gig, then there's an inference that they're not going to be as ethical and unbiased. He also knew, based on the e-mails about Mr. Jackson's health deteriorating. He also knew that Dr. Murray -- he wasn't sure how effective he could be, whether it's as a psychiatrist or a physician, inferences can go both ways, but he personally had that knowledge, and, on one hand, he told Mr. Ortega, hey, don't do anything. Don't burn the house down.

On the other hand, he's telling others, "I don't know how effective Murray can be." so he's telling different stories personally. That's outside of what he should be doing for AEG He talked about what he suspected; that the condition could be chemical or physiological. That's personal to him.

He admitted that he hired Dr. Murray. That's been in the interview that he gave shortly thereafter and in his testimony. He placed Dr. Murray in charge of the rehearsal schedule. That's in evidence. And he arranged for meetings with Dr. Murray, and he called Dr. Murray for 20-plus minutes before he had the meeting with Mr. Ortega on the 20th. Mr. Gongaware negotiated with Dr. Murray about his salary, and he made statements in the e-mail, which, I know you know, "remind him of what's expected of him, who is paying his salary," and such. So that's beyond what a regular employee or officer would do. That is taking on a personal position. And that demonstrates that they have specific knowledge and specific actions that they undertook in this case which should allow the jury to determine whether or not they should be personally liable for their individual actions in this case.

Ms. Chang. And that makes it squarely within this *Frances T.*, because in *Frances T. Vs. Village Green Owners*, those directors of that condominium unit were not signatories to any contract. Any contract was between the condo association and the condo owners. But all of the negligent acts came from the directors because they had direct knowledge at the board meetings, and

they're the ones that decided, "take down that light. It doesn't fit with our scheme, even though you're in the darkest place where the crime occurs." and they took their time in assessing the danger. And that's far from what we have in this case. In this case we have lies, misconduct. I think a good way to look at this is several. We could have, for example, in this case, actually even brought in Shawn Trell as an individual defendant because of what his position is, but we didn't because there's a difference between what he did in the course and scope of his employment versus what Randy Phillips and Paul Gongaware did. There is a level there of their own knowledge, their own acts, that are negligent, but also with a twist of a lie and bad acts. In other words, their own independent bad acts put them squarely into *Frances T. And Village Green*. There are things that only those two know; there are things that only those two did; there are things that only those two -- they had two different branches of e-mails: one going out to Kenny Ortega, and one going out internally. And it's their own actions that make them personally liable. And it's not because they're agents, it's because they're directors. They are the co-CEO And the CEO. They direct the policy of this company. And I think that is what differentiates it. And we are squarely in *Frances T.* For all of the things that Mr. Panish listed, and because of all of the things that we found. In construing the facts in favor of the plaintiffs -- because there are arguments on both sides, as we must -- if the case law is close, if we have *Frances T.*, we say it has to be submitted to the jury. In the alternative, let us try to reopen and see if we could make it even more directly on point with *Frances T.* In the sense that these directors, it is their bad acts that we are concentrating on, not bugz, not Mr. Trell. It's the specific listed bad acts specific to the CEO. And co-CEO.

Mr. Putnam. May I, your honor, just very, very briefly. First of all, in terms of, I'll start with where they left off and come back to where they started. In terms of where they left off, your honor, this is -- yes, this is squarely in *Frances T.*, and *Frances T.* Says squarely that: "the board members may not be held personally liable absent allegations that they entered into a contract with plaintiff on their own behalf or purported to bind themselves personally." that's what it says. There was a difference in *Frances T.* -- which was not a negligent hiring case, I might remind the court; okay? There was a contract case, et cetera, in there. The -- it says explicitly you can't go after the individuals unless they in some measure were binding themselves personally. And that's why in every negligent hiring case, we went through all of them, both in this jurisdiction and others, who do they get rid of on dismissal or demurrer or summary judgment? They get rid of the individuals. There are all the cases I did, your honor, and I continued going through all of them, the *duke* case -- I can go through all of them. They talk about getting rid of individuals and leaving the corporate entity. Why? Because you're hiring them, you're hiring them is an element of what you must find here. And you cannot find that Randy Phillips or Paul Gongaware hired here. They did not. And that is because, I repeat, they acted on behalf of AEG Live. I'll also just note very quickly, your honor, a number of things that were just stated in reference to them are absolutely not what the facts show or the facts are in dispute to such a way that it cannot be held

as substantial evidence for them, which is something that they need to have. As you note, your honor, and --

Judge. You're not disputing that they would have done those things, written the e-mails?

Mr. Putnam. Oh, no, no.

Judge. Whether they did it on their own behalf or did it on behalf --

Mr. Putnam. To hire for themselves. No way they were hiring for themselves, your honor. And things like, for example, for financial motives. They were talking about the idea it would have harmed Randy Phillips if the Michael Jackson thing had not proceeded or he had not -- that's true for every employee. Every one. Everybody within an employer. There is the idea that you're going to benefit from, that's why you were entering into it, and it would be bad for it not to go through, and often it's financially so. That's just a fact. Nor is it a factor or an element in terms of negligent hiring, your honor. Bad acts, same idea. What we have here is an element that you had to have hired. He did not hire. He did not do it individually or otherwise. And there's no evidence that Mr. Phillips or Mr. Gongaware in any way so hired. I also would note, your honor, now going back to -- and adding to that, they say, "if you're going to find this, then we get to reopen," one can move to reopen on a nonsuit, but one doesn't get it as a matter of right no matter what. That's not how it works. There has to be a proffer that I can show to all of you that we can change the court's outcome. I've looked at it, since they have been arguing to reopen their case now for weeks, whenever something was brought up, so I knew it would go to --

Judge. I think they moved for one witness.

Mr. Putnam. Yes, but they also mentioned --

Ms. Bina. Which they're not going to establish the liability of Randy Phillips or Paul Gongaware.

Mr. Putnam. And here's the thing, your honor, about reopening. The proffer has to be "we have x, and it will show therefore." what did you hear? "perhaps we can see if maybe there is something there that could help us there"; okay? That ain't the standard, okay, for reopening.

And there's a reason for that, your honor. There can't be the case where, when you're the plaintiff, I will do it in whatever order I want, whenever I get there, oh, I failed to meet an element now, let me get -- it doesn't work that way unless you have specifics to go to. Now, going back to something else that was said a moment ago in terms of the other aspects here as to all defendants, and why I believe and continue to believe that this will utterly change California law and is contrary to all established law. They talked about prior cases, and why they're so different and, therefore, this case is an exception. This should change California law. They talk about --

Judge. I don't know. Are you saying it changes California law?

Ms. Chang. No. We're saying it squarely fits the California law.

Judge. That's your position. I don't think they've said that.

Mr. Panish. Ours is different. We're not saying we're changing the law. We're consistent with existing law, and his position is that --

Judge. It is changing the law.

Mr. Putnam. And, for example, the consistency with the present law that they point out, and I'll mention two. In terms of *Mendoza*, it's utterly different, because he personally owned that gun that was the example just provided. Well, in the same vein, Dr. Conrad Murray was personally using medical supplies he bought. He was using his own instrumentalities as well. That is not different and can't be cited as a difference here of any meaning because it isn't different. Similarly, abc -- abc is utterly different. That casting couch element happened at his home. Perhaps Ms. Chang doesn't remember the actual facts of the case. What occurred here is the idea that he said, "come to my house for a brunch early tomorrow morning. The reason being, there are people here who can help with the upcoming upfronts." the things that happened in September with abc, cbs, nbc, that says, "here are the shows that are coming." "these people are going to be there. Why don't you come, because that's what it's for. And then we will go to the upfronts from there." so, no, it was in the capacity as the casting director for abc. There's no difference there as just claimed at all. On the contrary, it is the same as here, and that is why I continue to believe, your honor, that the present holding would change California law and is inconsistent with the law today.

Ms. Bina. And I have one little point to add, your honor, since we got two on that side --

Mr. Panish. We don't object.

Ms. Bina. They just really revealed, I think, what the court -- in their case, they were quoting the Randy Phillips e-mail, as they always do, you know. If someone needs their job, that means they're more likely to commit bias. And this really is an argument, your honor, that no doctor here could possibly have -- in other words, they're taking the -- specifically with Dr. Murray, they're saying there isn't anything limited by Dr. Murray. By all accounts, even by their own expert, he looked like a fine, upstanding citizen. What they're saying is, any doctor that Michael Jackson wanted should have been suspect on his own and that anyone that you paid and inadvertently created a conflict of interest for --

Judge. I think what they're saying is that Michael Jackson had a problem, you were paying him, but you're paying a doctor who was in financial straits. Not all doctors are in severe financial straits. And so I think there's a potential of providing a doctor who would have been different than Dr. Murray.

Ms. Bina. I think.

Judge. Probably not advisable to do it.

Ms. Chang. No.

Judge. But you probably could have found somebody other than Dr. Murray who wouldn't have been in that situation. So I think there is a difference factually.

Ms. Bina. I think, your honor, though, that is where we get into the public policy issue. If you're going to say that anyone with financial problems should be presumed to be committing -- let's say, example, your honor, I have a jewelry store. And I hire a security guard for my jewelry store. If I hire anyone who has debt, am I now going to be negligently liable if they then rob the jewelry store? No, because we accept that people on their merits can perform the job that --

Judge. Ms. Bina, you're disputing the A.M.A. The A.M.A. Has guidelines about conflicts of interest and financial incentives, so I'm not making this up.

Ms. Bina. I'm not disputing(THEN SHE DISPUTES IT ANYWAY) the A.M.A., your honor. What I'm saying is that the A.M.A. Places the responsibility squarely on physicians. And here, the duties that were owed to Michael Jackson were on Dr. Murray. And I think it's very dangerous in terms of precedent to takes those duties off the doctor, where there's nothing to show he was incompetent or an unfit doctor. Because those are the kinds of things that would provide red flags in the ordinary course. There are cases in other jurisdictions where, you know, oh, they've committed malpractice before. Those are the kinds of things that put a non-doctor on alert that there's a problem. With someone's personal inability to manage a conflict of interest, the only person who knows that is the person, which is why the A.M.A. Places that burden on the doctor. They're basically taking it off the doctor and saying, if you inadvertently create a motive - - there's no dispute that AEG Didn't know about Dr. Murray's financial condition; that Dr. Murray lied about it. So -- and we can go into whether they should have known. But let's say even if they did know, there's no -- it's, I think, dangerous to create a rule of liability that says, "if you know that someone has financial problems, you have to then assume that they're likely to act unethically." and that's the argument here. You have to assume that they would be financially motivated to do something wrong and takes the burden off the doctor to manage his own conflict of interest, because -- which is where the A.M.A. Places it squarely -- and anyone interacting with the doctor who might influence their medical judgment. Again, not conceding that anything like that happened here, but if that's the idea, it's certainly unprecedented and certainly beyond the scope of a negligent hiring tort.

Judge. Plaintiffs? (THANK GOODNESSXJUDGE LETS THE PLAINTIFF FINISH)

Ms. Chang. Yes. Your honor, I think we argued this enough. I think in the jewelry store context, nobody --

Judge. Forget about the jewelry store.

Mr. Panish. You can't sue yourself.

Ms. Chang. And, also, they don't have access to a prescription pad. But in this case --

Judge. The doctor.

Ms. Chang. Yeah. Not only did the A.M.A. Have this -- not only did you not make it up, but what AEG Did in this case is, they created the conflict itself by thrusting that document to Dr. Murray that basically said -- and I don't care which doctor it is, especially this doctor would have a problem, "if the show is postponed or canceled, you don't get \$150,000 a month." that is a huge problem. And all of this, regardless of the difference between *Mendoza* and between abc is where he was, and what he was doing, is in -- squarely related to what he was hired for. And the key thing is, the evidence is very strong, and your honor cites it. This -- what they've done, and what they've created in this case, had never been done in the industry before and should never be done in this industry. They have never done this. And I've listed every single one of them, Julie Hollander, Shawn Trell, Randy Phillips, Paul Gongaware, as well as their lawyer, Kathy Jorrie, as well as their experts, and Kenny Ortega who had 40 years of experience. It's unheard of. And it goes far beyond the pale. They created the conflict, and I think all of that is well within the record. And, again, we just submit on the tentative on that portion--

(IN BUTTS DEFENSE AGAIN)

Ms. Bina. I want to briefly respond, your honor, that "this has never been done." and I don't want to get bogged down in the factual disputes. But the evidence is that AEG Live had produced two tours and that the prior tour, they did not hire a doctor. The evidence is also, though -- for instance, for things like Coachella, they do have doctors on site. And there is evidence that other producers of other concerts bring doctors on tour. For instance, the rolling stones and Celine Dion. So this idea that this is somehow unprecedented in the industry is not actually true. They like to say it, but there's no evidence to support that part of their argument. They can say it's unprecedented for AEG Live, that's true, but that's the extent to which the evidence has been done here. I mean, for an example, your honor, in --

Judge. The details about how, with the Rolling Stones, or is.

Mr. Panish. Celine Dion hired her own. That's what Meglen said. Celine Dion did her own thing.

Ms. Bina. Well, actually -- **(AND AGAIN)**

Ms. Chang. They were promoters. It was a complete package tour.

Ms. Bina. (HERE SHE LIES) Well, your honor, what Mr. Meglen said is that AEG Live advanced the cost of production to Celine Dion's production company who then retained a doctor. So they weren't doing it directly, they were paying for the doctor just in a slightly different way. The point is, there are differences in the details. There are differences in the details. Recently when the Jackson's were performing at AEG, they provided a contract that said, "bring a doctor if we have an emergency." that was in the Jacksons' contract.

Ms. Chang. That's not in evidence.

Ms. Bina. (THEN SAYS, WELL ITS AN IDEA) The point is, your honor, they've got some type of unprecedented, for the industry, to have doctors on call for concerts or concert tours, and there's no evidence that it is. So I wanted to deal with that idea. To respond to the idea that they should have just never been in negotiations with a doctor, I think, again, you have a very different situation here, because Michael Jackson -- it's undisputed Michael Jackson asked AEG Live to retain Dr. Murray and pay him \$150,000 a month.

Judge. Well, initially he asked for 5 million.

Ms. Bina. What he did. Initially Michael Jackson --

Judge. There was a red flag, wasn't there?

Mr. Panish. According to Mr. -- their expert said there was.

Ms. Bina. The point is, Mr. Jackson is the one who set the price. And Mr. Jackson was the one who asked AEG Live to bring him on the tour.

Judge. What about the 5 million, though? Who set the 5 million?

Ms. Bina. Nobody set the 5 million. Dr. Murray asked for it, and Paul Gongaware said, "no."

Mr. Putnam. They laughed at him and said, "no way," and ended the conversation.

(SIDENOTE: It is customary for an attorney to speak, then the judge will look to the other for A response, when Bina is saying "But" she is butting in)

Judge. Right.

Mr. Putnam. And as was also the testimony, which you heard from more than one person, was that many people saw Michael Jackson as money bags, so they could ask for unprecedented amounts of money, regardless of what services they were performing. And we had many, many examples of that. So the idea that that would be a red flag that would have the necessary nexus that that would show you that he was going to provide a criminal act acting on his own --

Judge. I know you like to describe it very narrowly, but the duty is not that narrow.

Ms. Bina. Let's take it broader, your honor. I think the law is here, but take it broader. Let's say the risk that Dr. Murray would commit negligent or proscribing of anything for Michael Jackson, they still haven't put forward a single specific fact of Dr. Murray, other than he asked for \$5 million, because Michael Jackson is the one who set the 150,000.

Mr. Panish. Well, that --

(Here Mr Panish and Judge is having A discussion, Bina constantly tried to butt in.)

Ms. Bina. And there's no evidence --

Judge. According to Paul Gongaware.

Mr. Panish. Right. If you believe Mr. Gongaware. And the jury has the right to determine whether he's credible or not.

Ms. Bina. There's no --

Mr. Panish. He relies on two people that are dead.

Judge. True.

Ms. Bina. There's no contrary evidence, your honor --

Mr. Panish. They don't have to believe it. Just because there's evidence, it doesn't have to be believed. The jury doesn't have to believe that.

Ms. Bina. Your honor --

Mr. Panish. They could take differences based on everything else in the record.

Ms. Bina. I'd like to finish my sentence, your honor. There is no contrary evidence that Michael Jackson set the price term. It also, the draft required Michael Jackson's signature to become effective. So assuming -- I suppose it's possible, theoretically, that the jury will believe that despite all of this, we set the price term voluntarily, picked him. There is no evidence to support that. You can't speculate and guess in terms of a nonsuit.

Judge. It could have been offered simply by Dr. Murray. He may have just come up with the number.

Mr. Putnam. And the question -- (AND CAN YOU BELIEVE HERE PUTNAM INTERRUPTS THE JUDGE, BECAUSE THE JUDGE IS AGREEING WITH PANISH, PUTNAM HAS THE NERVE TO SAY TO THE JUDGE "AND THE QUESTION IS"?)

Judge. Just saying. If we're just --

Mr. Putnam. Let me speculate in the same way. Let's say that's the case and, therefore, he was going to provide negligent medical care?

Ms. Bina. Right.

Mr. Putnam. There's nothing in his history, and that's what you look to. You look to all of the cases that look into the idea that the person was in some way reprimanded.

Judge. Let's put it this way: in every medical malpractice case, there are often doctors that don't commit medical malpractice for years and commit medical malpractice. They get sued, and they get held legally liable.

Ms. Bina. They get sued, your honor, but their employers don't.

Mr. Putnam. Their employers don't.

Mr. Panish. That's not true.

Mr. Putnam. That is exactly the point here.

Mr. Panish. That's not true.

(NOW THINGS HEAT UP, AND PANISH IS NOT BACKING DOWN EITHER, USUALLY THIS IS WHERE PANISH ALWAYS GETS IT!!!)(JUST TRYING TO GIVE YOU A FEEL OF THE HEARING, HOPE YOU DON'T MIND)

Mr. Putnam. The employer has to have some form of notice. And if it comes out of the blue, there is no notice requirement. And as a society, what we've determined is, nonetheless, your employer can be determined to be liable if you should have known and were on notice or should have been on notice. And if you had nothing to put you on notice, then you're being held strictly liable as opposed to having a notice requirement for liability.

Ms. Bina. Which happens with vicarious liability, of course, your honor. There are situations where the employer is someone who commits malpractice and is held liable. But here the employer, Dr. Murray, in the first instance is GCA. Medical company. And it's already established, as a matter of law, he's an independent contractor, so we're not dealing with vicarious liability. With negligent hiring, there has to be some facts -- and it sounds like your honor is saying the fact is he needed a job and asked for a lot of money, and I just don't think that under the case law, if that's the only thing that's specific to Dr. Murray, there's any basis to find

liability here. Also, as noted before, I think it's dangerous to impose liability on somebody for creating motive, essentially.

Ms. Chang. Your honor, I just want to clarify the record so the record is not unclear. What I was stating that has never been done before, because I don't want it to be muddled, is never before does an entity, such as AEG Live, get involved and try to contract with other -- a private physician for another. That's what I cited for. And I just want the record to be clear on that. You don't get involved in a contract with someone else's physician and create this trinity. So with respect to that --

Judge. A three-way contract, you mean?

Ms. Chang. Yes. A two-way or three-way --

Mr. Panish. Third party.

Ms. Chang. And that's never been seen by Dr. Green, by anybody. But that's all cited --

Ms. Bina. Again, Dr. Green said he saw lots of three-way contracts, just not one specifically dealing with this concert promoter, your honor. So that, again, is a slight misstatement of the testimony.

Ms. Chang. It's like we're giving closing arguments.

Mr. Putnam. It's a nonsuit.

Ms. Chang. Which is nice, but I think that --

Mr. Panish. If it's a nonsuit, contrary evidence isn't argument.

Judge. It is true. It's just what --

Mr. Panish. There's no contrary evidence. It's the light most favorable to the non-moving party, so there is no --

Judge. Very true.

Mr. Panish. By them arguing both sides shows the factual dispute, and you don't argue.

Mr. Putnam. You can't speculate, though, your honor.

Ms. Bina. That's what he's doing.

Mr. Panish. They have the wrong standard.

Ms. Bina. Their evidence. And can you be fair to both sides? Obviously, there's lots of evidence in the defendants' favor we'd love to cite for the motion.

Mr. Putnam. We continue --

Mr. Panish. You did.

Mr. Putnam. No, we didn't.

Mr. Panish. Just argued it all.

Ms. Bina. But the point being, your honor, this really is a legal issue. And the question is: can you just go to it from -- basically, what I'm hearing and what the order is: Dr. Murray needed the money, Michael Jackson looked ill, and there was a contract drafted -- obviously there's a dispute whether it's executed. For purposes of this motion, we have to assume there was a hiring -- that motivated Dr. Murray to violate his ethical obligations as a physician, even though no one intended that, and even though Michael Jackson had specifically asked that a contract be drafted. And I think that those two facts, your honor, at least are disputed. I don't think under the case law that's enough to find he knew or should have known he was going to harm Michael Jackson.

Mr. Putnam. Again, it changes it to somehow the totality of the circumstances, which is not the law in California or anywhere else in the US.

Mr. Panish. We keep rearguing the same thing. They misstate what you've ruled. You've made it fairly clear.

Judge. Okay. I think I'm going to deny the motion for nonsuit as to AEG Live, but I'm going to grant it as to Phillips and Gongaware.

(AND BAAAAAM JUDGE DOES NOT CHANGE HER TENTATIVE RULING WHICH WAS TO DISMISS RP AND PG. PLAINTIFFS HAVE A RIGHT TO REOPEN, THEIR RIGHT WAS TAKEN AWAY FROM THEM!!!)

Mr. Panish. What about reopening?

Mr. Putnam. Your honor, would it help --

Judge. You haven't proffered anything that would tell me --

Ms. Chang. Okay. That's fine.

Mr. Putnam. Your honor, would you like me to -- in the couple little factual areas I mentioned before --

Judge. I can make changes.

Mr. Putnam. You want me to give you something with that? Whatever you would like. I'm just asking.

(PUTNAM IS BEGGING,, HES TOO LATE TO SAVE AEG, THAT'S WHAT ALL THIS WAS ABOUT, JUDGE ALREADY MADE A TENTATIVE RULING TO DISMISS RP AND PG. SO WHEN YOU SEE PUTNAM LAUGHING IN FRONT OF THE CAMERAS, REALLY HE IS CRYING INSIDE,,)

Judge. There were a couple things.

Ms. Bina. Bugz Houghdahl's status.

Judge. Yes. Bugz Houghdahl.

Mr. Panish. What evidence is there he's an independent contractor? He's clearly an agent of AEG So it doesn't matter.

Ms. Chang. His e-mail was AEG

Mr. Panish. Right. He's writing an e-mail from an AEG E-mail address --

Ms. Bina. No.

Mr. Panish. -- so clearly, he's at least an agent working for the benefit of AEG So whether he's an employee --

Ms. Bina. It's bugz@mac.com.

Judge. He was a tour manager.

Ms. Bina. He was the production manager, your honor.

Mr. Panish. For AEG Live. So whether he's an employee or independent contractor, he's still an agent of AEG Live.

Judge. Well, Kenny Ortega is an independent contractor.

Mr. Panish. He's still an agent, too. There's a difference between -- an agency relationship doesn't depend on whether you're an employer and an independent contractor.

Mr. Boyle. Right. That's an easier word to use.

Mr. Panish. Right. Just like they're trying to claim that -- they got this evidence that Mr. Dileo is an alleged agent of Mr. --

Judge. Well, I haven't made any determination that Bugz was an agent of AEG Live.

Mr. Putnam. Not necessary.

Judge. And I haven't made any determination about --

Ms. Chang. Mr. Dileo.

Judge. -- Mr. Dileo.

Ms. Bina. All we're saying is the word "employee" is wrong.

Mr. Putnam. That's all.

Ms. Bina. There's no evidence in the record to find he wasn't an employee. His address was bugz@mac.com. He was hired as the production manager for the "This Is It" tour. If we provide further evidence -- I can certainly demonstrate Mr. Houghdahl was not an employee. I think there was evidence to that effect.

Mr. Putnam. Yes. Your honor, all it requires is independent contractors, plural, than possessive, and then I think it's correct.

Ms. Chang. Or why don't you state his name?

Mr. Panish. Why does it matter?

Judge. Without a distinction.

Mr. Putnam. That's perfect, your honor.

Ms. Chang. Just put his name.

Ms. Bina. That's fine.

Mr. Panish. Can we take a short break?

Mr. Putnam. I'll leave, your honor --

Judge. Okay. If you have anything else?

Mr. Putnam. I will, your honor.

Mr. Putnam. All right.

Ms. Bina. Short break, your honor.

Judge. Okay. 11:30. (a recess was taken.)

Judge. One other thing that I forgot to mention that I wanted to mention about the motion for nonsuit was, there's multiple theories of recovery that we're not mentioning. We've spoken so much on the hiring. It's hiring, retention and supervision. And we spent a lot of time on hiring, and I'm probably to blame for that, because way back on the summary judgment, I focused on that. I didn't really analyze the retention or supervision portion of it early on in the summary judgment motion. Ever since then there's been this focus only on that.

Mr. Panish. Right.

Judge. But I think there's other theories of recovery and --

Ms. Bina. They're all the same elements, though, your honor. They all require that the defendants knew or should have known facts, put them on notice that Dr. Murray was likely to harm or we say overdose with Propofol Michael Jackson. The only issue is the temporal element, when those facts were learned. We also have a brief for supervision. I teed that up way back when in terms of whether that theory could be held against independent contractors. So that will be something we're arguing later this week. But retention and hiring, I think there's authority for, but it's the same standard. The question is just when did you know the facts that you knew or should have known and put you on notice.

Judge. Yes.

Ms. Bina. To the extent we were arguing -- certainly, from my perspective, I was trying to argue at no point up to June 25th did the defense know or should they have known of any facts that would put them on notice that Dr. Murray was unfit or incompetent.

Mr. Putnam. We tried in the briefing to argue it as well, your honor.

Judge. I just wanted to comment on that.

Mr. Panish. Yes.

Judge. We tended to focus on the facts of the hiring --

Mr. Panish. We did.

Judge. -- And not on the subsequent facts. A little bit, but not as much as probably we should have.

Ms. Bina. If there's anything you'd like us to argue on, I'd be happy to discuss those.

Judge. No. Okay. The next thing we were going to talk about, why don't we do Faye.

Ms. Bina. Okay.

Judge. Okay. This was, I think, plaintiffs' motion.

Ms. Chang. Yes, your honor.

Judge. Plaintiffs' motion to admit text messages in Faye's phone that were from Kenny Ortega.

Ms. Chang. Actually, our reply, your honor --

Ms. Bina. Not from Kenny Ortega. They were from Karen Faye to her boyfriend. She quoted --

Mr. Boyle. I can -- I'm sorry. It's my motion. I can state what it is, because that's not exactly correct. Page 16, our reply, lines 20 through 24, specifically lays out exactly what we are asking for: "and the following evidence should be admitted: Kenny Ortega's testimony specifically on prior inconsistent statements." and then the texts as past recollection recorded.

And the texts as prior consistent statements. So there's three different theories, and three different things that we are doing. And basically, your honor, in this motion, what we are alleging is, there's two different conflicting pictures of how Michael Jackson was treated by defendants shortly before he died.

The defendants have all stated on this day of love, affection, total support, no pressure inflicted on Michael Jackson whatsoever. Plaintiffs, however, know that there's an entirely different

scenario where they kept bringing up they were funding his entire life, including his house, his food, his kids, and they threatened to pull the plug, put everything he had at risk, including his kids, if he did not, and I'm quoting, "get his shit together," end quote. And we state, based on the case law, that in search for the truth in the case, the jury's entitled to hear evidence from both sides.

We all know from what was already submitted -- and we talked about it in the sidebar ad Nauseum -- that a pivotal conversation occurred between Kenny Ortega and Karen Faye in which the intervention meeting was held and discussed in considerable detail. And interestingly, Alif Sankey, in her declaration to -- that was submitted as part of the motion for summary judgment evidence, also states the same type of conversation and the same type of detail. And the discussion was upsetting and remarkable enough to Karen Faye, because of the specific pressure being inflicted on Michael Jackson, what she saw, that within hours of the conversation, she was writing texts to her boyfriend on her iPhone about the issue. Now, before we even knew about the iPhone texts, we had all discussed the fact that we wanted to elicit from her just the testimony. And your honor stated correctly, the easiest way to do this is get Kenny Ortega here, see what he says about it --

Judge. Right. And see if he denies.

Ms. Chang. Exactly. And in fact, that's what we did. And in fact, he did deny some; he admitted some; and he said, "I don't remember" to some. And I listed and attached the transcripts, so there would be no confusion, as to what he did say of answers to some issues. So with respect to the ones that he flat-out denied saying, that's a prior consistent statement. And that's on page 3. For example: "do you recall if you told Karen Faye that AEG Was funding?" "no." "have you ever" - "did you ever tell them that?" "no." "that AEG Told Michael if he doesn't do this, he loses everything?" "no." so that's prior inconsistent statements. Now, the issue becomes after that --

Judge. And -- okay. So you need to call Karen Faye to --

Ms. Chang. Correct. To talk about that as we discussed before, and that renders it non-hearsay on the Kenny Ortega level because of the prior inconsistent statement. Then we came to the issue where, unbeknownst to both sides, she has these texts that records everything dutifully on her iPhone. The issue then is, did the iPhone texts help her when she didn't remember certain aspects of that conversation? And if they did, then they can be read out loud to the jury. Now, defendants claim, and they cite from her testimony, where she says, "I specifically remember" -- I'm going to get the exact quote here. Hold on.

Judge. Well, remind me. Did she -- did you ask her about the prior inconsistent statements yet, or you have to call her back?

Ms. Chang. We have to call her back. We were right in the middle of asking her questions --

Judge. Okay.

Ms. Chang. -- And defendants kept objecting, and the court stated, "how much more do you have on this examination?" in other words, can you come back to this, and can you finish what you have? And Mr. Panish responded, "I can go to some other things, sure." in other words, we all knew this fight was coming, this day was coming, so why waste -- they kept objecting every five seconds. So, basically, what we -- what they allege, too, is they claim that Ms. Faye testified that she remembers, quote, "specifically everything that happened about what occurred on June 18th." but this testimony refers to the events that happened, such as when he came late to rehearsals, everything. And we were trying to elicit from her -- because she did state she was trying to remember what happened in the conversation. So we have to get that out of her, and we were stopped right in the course of the conversations. And if we can't get it out of her, if Ms. Bina is correct, and she says, "oh, no, I remember everything absolutely," then I would agree then she can't read the text out loud, because if she remembers it completely, she can just say what is inconsistent with Kenny Ortega. However, if it does -- if she --

Judge. Right, that would be the next step.

Ms. Chang. The next step is, then, she can read them. They are not admitted into evidence.

Judge. No. The next step -- refreshing recollection, would be the first step. If she doesn't remember what Kenny Ortega told her, okay, would looking at a copy of these texts --

Ms. Chang. Actually, 1237 allows her to read the prior -- the past recorded --

Mr. Panish. Past recollection recorded.

Ms. Chang. The past recollection recorded statements into the record. They're not admitted, but what she wrote is -- can be read.

Judge. I think you're jumping ahead a little bit.

Ms. Chang. Okay.

Judge. First try the refreshing recollection, because it's very short; right?

Ms. Chang. Well, they're very detailed. I have them right here. Well, I guess. I mean, compared to, like, the "emancipation proclamation," yes. I guess everything is relative. Yeah, I'll agree with you, your honor, they're fairly short.

Judge. Okay. The first thing you do is you try to refresh recollection with her text messages.

Ms. Chang. Okay.

Judge. And if she remembers, after reading them, then she can testify as to what Kenny Ortega's statements were.

Ms. Chang. Okay.

Judge. Now, the past recollection recorded --

Ms. Chang. States: "evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule" --

Judge. Right.

Ms. Chang. -- "if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which: "was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness's memory; "was made by the witness herself; "is offered after the witness testifies that

the statement she made was a true statement of such fact; "and is offered after the writing is authenticated as an accurate record of the statement. "The writing may be read into evidence, but the writing itself may not be received into evidence unless offered by an adverse party."

Ms. Bina. Right.

Ms. Chang. So therefore we have to --

Judge. Usually, the way --

Ms. Bina. You refresh first, your honor. You're absolutely right. And when it's my turn, I'll go.

Ms. Chang. Would you please not?

Judge. Usually, the way that past recollections are admitted is, there are usually long lists of things that people just can't remember. I don't know. For example, I don't know, a long list of addresses. 20 addresses. And I might ask somebody, "What addresses did you refer this person to?" "I don't remember, but I wrote a memo." "Okay. Would looking at it refresh your recollection?" "Well, sure." you look at it. "Can you tell us what addresses?" "Well, no, because there's 20 of them. I can't recite them by memory." "Okay. Did you prepare a memo?" "Yes, I did." then you lay the foundation for the memo, and then she can read from the memo and the 20 locations. That's usually how it comes up. But if there's a text, it doesn't seem to me that's in the typical nature of past recollection recorded.

Ms. Chang. Well, a lot of people -- I think it will come up more, because texts has really changed a lot of people. But many people don't sit down and say, "oh, my god. Let me write down this thing." some people do. We had that in *Cuthbertson*, Stephanie -- the first witness, Stephanie Chan, wrote -- she went home and was so upset by what she saw, she went to her computer and typed out the entire statement, which was in fact read to the entire jury.

Judge. It was a long statement.

Ms. Chang. Yes. It was a long statement.

Judge. It wasn't something --

Ms. Chang. Correct.

Judge. -- She could just recite by looking at it and refreshing --

Ms. Chang. My heart. Exactly. And I think that a lot of people do not take the time to write out, like when Mr. Panish tells me things, I don't sit down and write and record it all. But if it was something shocking, I might in an e-mail. And I think that's the point. Because if something -- if you take the time, like Ms. Chan did, or whatever, to record something, then there is some level of inherent truthfulness associated with it --

Judge. Yes.

Ms. Chang. -- Because you're doing it when it's fresh, you're doing it for the purpose of remembering it. And I think what she did is it struck Ms. Faye, because she cared very deeply about Mr. Jackson, that she was extra vocal, like, "you would not believe what happened. Here's all the things" --

Judge. How long was it?

Ms. Chang. Here's the texts right here, your honor. I can show it to you. It's very -- it's attached here. Here's exhibit 1. You can see the iPhone bubbles.

Judge. I can't. My eyes --

Mr. Putnam. I can't from here.

Ms. Chang. It's actually -- it goes four pages. And I can read it for the record. It basically says: *"MJ has not shown up yet. His call was 4:00." this is at almost -- its 7:55 p.m. "his fear is big. He needs a 24/7 therapist."* and then the next one, it goes: *"Kenny was mad."*

Ms. Bina. The fact that there's an in-between text is relevant.

Ms. Chang. Okay. Well, I'll read the whole thing. I'm sorry.

Mr. Panish. I just gave --

Ms. Chang. *"Can you bring that suitcase with clothes to London for Michael's clothes?" "She will pay excess baggage charges?" "Of course." "He needs a few extra days to complete some items. This gives him the time he needs." "Okay. Thanks, my love. I will tell him." "Didn't get home until 2:30. Kenny was mad," all in caps. "He and Randy Phillips and the doctor held a sort of intervention. MJ didn't show till 9:30 p.m. Kenny told me AEG, (Randy Phillips) is funding his entire life right now. His house, food, kids, school, everything. They told him they will," all capitals, "pull the plug if he doesn't get his shit together. If he doesn't do this, he loses everything, probably even his kids." her boyfriend texts, "I hope he doesn't." she writes back, "He came in 'very serious' last night. Any 'hand holding' has been removed. He has to be forced to face his fears." that's the texts.*

Judge. Okay. And so not all of this was denied by Kenny Ortega; right?

Ms. Bina. Well, when we get to that, your honor, I don't think any of that was, but we'll get to that when it's my turn.

Ms. Chang. Well, your honor --

Judge. What part are you, plaintiffs, are claiming were not remembered? I think by your --

Ms. Chang. Let me turn to it here. I'm sorry, your honor. I'll have it here. The fact -- the part that he denied was that they were funding Jackson's entire life and that they threatened to pull the plug so that he would lose everything.

Judge. Okay. "Kenny told me AEG"? Okay.

Ms. Chang. And we could just turn to Mr. Ortega's testimony here that we attached here.

Judge. And the question to Kenny Ortega that he denied was what?

Ms. Bina. Your honor, there's several. **(JUDGE SHOULD HAVE TOLD BINA TO BE QUIET LONG AGO)**

Ms. Chang. Well okay. **I think she's asking me.** I'm looking it up right here, your honor. I'm sorry.

Ms. Bina. They're in our opposition brief. **(BY THE WAY BINA IS CONSTANTLY DRINKING ROOT BEER, IS PUMPED FULL OF CAFFEINE & SUGAR, VERY JUMPY)**

Ms. Chang. We have listed his testimony. And, basically, he denies that he said that if he doesn't do this, he loses everything; he admits that maybe he told her about something like, any hand holding of Michael had been removed. He denies that he told Karen Faye that he had to face his fears.

Judge. I don't know why he would deny that. I think he said something like that in an e-mail, but --

Ms. Chang. He said: *"do you recall whether you ever told Karen Faye that AEG Had told Michael that they'll pull the plug if he doesn't get it together?"* **"Maybe in some capacity to that."** that's what he says. And then specifically: *"did you tell Karen Faye that he was funding Michael's entire life right now? His food, his kids, everything?"* **"no."** *"Did you ever tell Karen Faye that AEG Told Michael that if he doesn't do this, he loses everything?"* **"no."** other things, he specifically stated, **"I don't remember."** let me --

Judge. So right now, it looks like the only thing he really denied was that -- the statement **"Kenny told me AEG (Randy Phillips) is funding his entire life right now. His house, food, kids, school, everything."**

Ms. Chang. **"and that he could lose everything."**

Ms. Bina. And actually, your honor, on that first one, he didn't deny making that statement. He was only asked if he recalled making the statement, and he said, "no." the second one he denied making the statement, but the text doesn't attribute it to him. Anyway, I'll let Ms. Chang –
(HERE SHE GOES AGAIN, AND SHE ACKNOWLEDGES SHES DOING WRONG)

Ms. Chang. Well, the good thing is Kenny Ortega is coming back on Monday, according to the defense.

Judge. Oh, no.

Ms. Bina. Depending on your honor's ruling in terms of the "This Is It" movie and this issue and any number of issues. We're trying to avoid bringing him back.

Ms. Chang. Is the only issue if the whole movie is in?

Mr. Putnam. Your honor, it's more than what Kenny Ortega has. And in fact, Faye was called --

Judge. It is just not unique to you.

Mr. Putnam. I will tell you, I heard precisely what you said, which is why we've narrowed it to something very precise, which is -- we may not have to do it if they agree that the movie is actually entered into evidence entirely at this point.

Mr. Panish. So Marvin -- can I ask Mr. Putnam a question? I know it's not --

Judge. Sure. Go ahead.

Mr. Panish. Are you saying that the reason that you may need to call Mr. Ortega back is because there's a potential issue regarding whether "This Is It" is in or not? Is that what you're saying?

Mr. Putnam. That's what I'm saying.

Ms. Chang. They think the whole movie should be in.

Mr. Putnam. I think the whole movie is in.

Mr. Panish. I just want to understand your position, is all. Did I say that?

Mr. Putnam. No. I understand you called him and told him, "you can argue before the court that he's not necessary as cumulative."

Mr. Panish. I haven't talked to Mr. Ortega.

Mr. Putnam. I know. Mr. Boyle did. They called and let me know that argument was made.

Mr. Panish. We didn't talk to Mr. Ortega.

Mr. Putnam. I'm glad you could know that. I believe there are reasons we can put that in.

Mr. Panish. Your honor, we've never spoken to Mr. Ortega.

Ms. Bina. Mr. Ortega's counsel.

Mr. Putnam. His counsel.

Mr. Panish. No. So all I wanted to do, I was just trying to understand, and was I correct in understanding --

Ms. Chang. Yes, you're correct.

Mr. Panish. That's all I'm asking. I'm not here to argue.

Ms. Bina. The biggest issue is the film. And the texts --

Mr. Panish. Well, he already testified about the texts.

Ms. Bina. Well, I'm not going to call Kenny Ortega about your videos. But, yes, the issue is the "This Is It" movie.

Ms. Chang. What we're saying is what's good for the goose is good for the gander.

Mr. Putnam. Karen Faye, I agree.

Mr. Panish. Do I get an answer?

Ms. Chang. Yes, he answered you.

Mr. Panish. They said, "Among other things."

Mr. Putnam. I did answer.

Mr. Panish. She just said among -- okay. You said, "Yes." thank you. But she said, "yes, among other things," so --

Ms. Bina. Your honor, I'd like a chance to respond about Karen Faye before lunch.

Ms. Chang. I wasn't finished. Can I suggest this, your honor?

Judge. All right.

Ms. Chang. I have in the -- between the motion and reply and the opposition, the entirety of Mr. Ortega's testimony relevant to these texts are in. I propose that we make -- specifically know which ones he said, "no" to, which ones he said, "I don't know" to, and to finish up my argument, we submit case law that says in the context of saying, "I don't know," an "I don't know" is sufficient to be a denial to allow her to come back and address them as prior inconsistent statements. So it is -- and then that raises the issue of whether or not they should be allowed to do a forensic examination of the phone. And what they allege as grounds for that is because, during her deposition, or before the deposition, they subpoenaed her and asked her to bring all her e-mails, and she didn't. And she didn't provide these texts. She explained how she found these texts and the number of hours it took. You're only required to submit what you have at the time of the deposition. She's not a party, didn't pursue it with her. Secondly, they alleged that the Frank Dileo e-mails, she didn't submit an e-mail that she wrote to Frank Dileo that said, "yippee" on the last day. She's thrilled at how much better he did. It's not inconsistent. But I will also point out that this is the time period where they represented Frank Dileo and did not produce those documents to us.

Ms. Bina. We didn't have them.

Mr. Putnam. We didn't have them.

Ms. Chang. So in any event -- nor do we know if she had them, either. We didn't know if she had all her e-mails or didn't have her e-mails or checked her e-mails or she has e-mails that are discarded or whatever. So, basically, I don't think that -- under California case law, and what's required to lay these foundations, had they submitted enough proof to show, "oh, we can call her a liar and say that she made up and fabricated evidence, and now we get a forensic examination"? I, as an officer of the court, pursuant to our discussion, took the phone, put it in a little bag. It's all been locked and secluded and everything. I mean, we could have done the same thing to Mr. Trell, I guess, and Mr. Gongaware and Mr. Phillips on their iPhones and their phones and did analysis if they erased everything, too. But I believe that it does nothing but raise the costs of an already expensive case. It is not required. Well, we would have to do a counter one. And it also delays, and we're all trying to finish this case and get it to the jury. We have always, always tried, from the very beginning, to get our story across. We've been lambasted by -- I think at one count there was like 68 objections during her examination. And I think that we tried very hard to get everything in, and we followed the court's suggestion with Mr. Ortega. I think it's very clear that there are certain things that she's entitled to come back for to say what Mr. Ortega said, the things that he says "no" to, specifically. And then we lay the foundation to see if we meet the burden of evidence code --

Judge. Well, I could see if maybe this --

Ms. Chang. -- 1235. I'm sorry. I was just finishing the evidence code.

Judge. -- Statement said, "Kenny told me AEG Told him that they are funding his entire life right now," I can see why you would want that. But this is just Kenny saying, "AEG Is funding his life right now." in other words, that's Kenny's opinion, really. I mean, I don't know how much that really adds to your case.

Mr. Putnam. Can we respond?

Judge. "Kenny said he thinks AEG Is funding his life." it isn't a recitation of Kenny saying that "AEG Told him that they're funding." I can see why that would be valuable.

Ms. Chang. Well, she can go into detail about what the conversation was. That's the whole point.

Ms. Bina. If she had the memory, your honor, there's no basis to admit the texts. So, I think, briefly -- and I'm going to try not to take too much time, but there's two -- three issues here: one, did Kenny Ortega testify inconsistently? Because if not, no hearsay statements come in at all; two, if Kenny Ortega testified inconsistently, he can be impeached by Ms. Faye's testimony, not by intrinsic evidence that is hearsay; and then three, is there any exception that gets the text in; and four, should there be a forensic examination of the text?

So starting with -- as a normal lawyer, I mean, you don't get to bolster your testimony through hearsay. For instance, Mr. Phillips has witnesses he spoke to back in the spring of 2009 who can come in and testify that he told them, "Michael is wanting us to have this doctor. I don't want him. He's really expensive." and it could bolster his own credibility that way, but you don't get to bolter your credibility through hearsay, you get to testify, which is what Ms. Faye has done.

She's discussed the events of June 18th in detail repeatedly, when asked by her counsel -- if you recall, they put the texts in front of her, and, you know, he said, "do you remember what happened on June 18th?" and your honor said, "without looking at the texts." and she says, "yes. I remember specifically everything that happened.

The only thing I used the text for was to refresh my memory as to dates. So there's no evidence at this point that she needs the text or is unable to remember them independently. In fact, many times in deposition she described in detail the conversations she contends took place that night.

So setting that aside, the first thing your honor must decide is, is there any inconsistent testimony of Mr. Ortega? Because otherwise, none of this is dealt with. So Mr. Ortega was asked a couple of different questions. He was asked: "do you recall whether you told Karen Faye that Dr. Murray and Randy Phillips had had some sort of intervention?" and he says, "I don't recall that." so he was only asked, "do you recall," not did he ever say it. So, "do you recall?" "I don't recall that." "do you recall whether you told Karen Faye that AEG Was funding Michael's entire life right now? His food, kids and everything?" he said, "no." again, the question was, "do you recall." they never asked the follow-up question of, "well, do you deny you said it? Is it possible you might have said it?" none of those things.

Judge. "Did you ever tell Karen Faye?"

Ms. Bina. Right. "do you recall whether you ever told Karen Faye that AEG Has told Michael that they're going to pull the plug if he doesn't get it together?" answer: "maybe in some capacity to that." and then, "did you ever tell Karen Faye that any hand holding is removed?" and he said, again, "we may have had a conversation about something like that." those four, he said, "I don't recall" to two of them, and he specifically admitted the other two. What remains is, "did you tell Karen Faye that Michael -- if Michael doesn't do this, he'll lose everything, including his kids?" he did say "no" to that, but the text doesn't attribute that statement to him. Now, Ms. Faye --

Judge. Doesn't attribute it to?

Ms. Bina. To Kenny Ortega. Doesn't attribute it to anyone. The last thing she says, "if he doesn't do this, he loses everything, probably even his kids," it's not clear that that's a statement in the text attributed to Mr. Ortega. Now, Ms. Faye might testify that Mr. Ortega told her that. She might testify, but it's not in the text. And if she testifies, I would argue, it's a pretty collateral matter, whether Kenny Ortega ever told Karen Faye, Michael might lose his kids if he doesn't do this, has no bearing on any position of the case. So that's the only time, your honor --

Judge. So are you telling me that you're trying to impeach Kenny Ortega?

Ms. Bina. Yes, your honor.

Judge. Is that what you're trying to do? To show a prior inconsistent statement? Because that's --

Ms. Chang. Well, your honor, here's how it all started. I'll remind your honor how it all started. We're trying to give the two pictures of what happened before Mr. Jackson died. We allege correctly I believe the record will show and will later be determined, if necessary, is that we were correct in our initial arguments to your honor that all of this is non-hearsay because it goes to Mr. Jackson's state of mind, because it shows why he was pressured to do things; that they were pressuring him so badly, he was up against the wall, he had no capacity to make decisions for his own.

And we reminded your honor, there was a long argument on sidebar that they are alleging negligence on the part of Michael Jackson and that all of this goes to all of these issues, and they even alleged punitive aspects against Mr. Jackson. We argued all of this, and your honor said -- was not persuaded by any of those, because we believe we have the right to tell both sides of the story. So the jury has only heard one side, and that's AEG's pure love, pure support, no pressure whatsoever, Kumbaya, holding hands, and "he hugged me the last day he saw me." okay.

That's the story the jury has. And we all know from a whole variety of sources -- and Ms. Jessica Stebbins Bina knows, because there's other people, not only Ms. Faye, but other people who have -- Alif Sankey, other people who have alleged to the pressure that's being inflicted.

However, after that argument failed, then we vehemently argued about, in sidebar, how -- other hearsay exceptions, and your honor finally said, "the easiest way to do this is get Kenny Ortega here. It's clean and dry, it's a prior inconsistent statement." and we agreed with that. So we all waited for Kenny Ortega.

So then the questions here now, it's unclear, like a lot of things in this trial, he never came out, flat out, either the question was unclear at some point, or the answers weren't clear. But there are some crystal-clear questions, and I'll read one from page 13,567 of the transcript: "*did you ever tell Karen Faye that AEG Had told Michael that if he doesn't do this, he loses everything?*" "**no.**" and this is right after, "*do you ever recall*" -- *you know, whether they'd pull the plug if he doesn't get it together. "did you ever tell Karen Faye that Michael had to face his fears?"* "**no.**" so all of that -- that is clear --

Judge. It's kind of interesting that --

Ms. Bina. Your honor --

Judge. -- If he didn't remember, then why didn't you refresh him? Well, you know, showed him something, and even if it was these texts, you could have shown it to him.

Ms. Chang. Actually, we did show those texts.

Judge. To Kenny Ortega?

Mr. Putnam. No. The answer is "no," your honor. The reason is because it's not inconsistent.

Mr. Panish. We actually did give it to his lawyer who showed it to him, and he denied it.

Ms. Chang. And he said, "I would never have this conversation with Karen Faye."

Ms. Bina. Your honor, again, it was not done on the witness stand, which is where it should be done. The only way you get a prior inconsistent statement is you ask the witness, and he denies making the statement. Now, there are times when the witness is being evasive, and only when the witness is being evasive, and they say, "I don't know," it can be construed as a denial.

Judge. That's true.

Ms. Bina. That's not the situation here. He admitted some of the statements. He didn't recall others. He denied two, but those two are not actually attributed to him in the texts. "any hand holding has been removed" and the statement about -- sorry -- the statement about "he has to be forced to face his fears," and "if he doesn't do this, he loses everything, even his kids" in the texts, are not attributed to Mr. Ortega or AEG Now, it's possible the witness has a memory that impeaches Mr. Ortega on those two statements, but that's not grounds for getting the texts in. And the other four statements were never denied, so there's no inconsistency there. Again, they had the opportunity to ask Mr. Ortega, "did you make those statements" --

Judge. To Ms. Faye.

Ms. Bina. -- "To Ms. Faye?" to have him get squirrely and say, "I don't recall," have him deny it --

Ms. Chang. There's a firm denial.

Ms. Bina. The standard follow-up answer, your honor, is -- to "do you recall making the statement?" is, "well, are you saying you didn't make the statement?" and they never asked that.

Judge. Or "if I showed you a text, would it help you refresh" --

Ms. Bina. "Would it refresh your recollection?" they could have, and all of that --

Ms. Chang. That's not what --

Ms. Bina. Can I please finish?

Ms. Chang. Your honor stated, "Get him to say whether he said it or not." there's no rule --

Judge. But you didn't do that.

Ms. Chang. Yeah. How -- "did you ever tell Karen Faye that AEG Had told Michael that if he doesn't do this, he loses everything?" "no." "Did you ever tell Karen Faye that Michael had to face his fears?" "no." we don't have to refresh his recollection.

Ms. Bina. Those were clear denials, your honor. We're not disputing that.

Ms. Chang. Okay.

Ms. Bina. But they're also not attributed to Mr. Ortega in the texts. So, again, it's possible that they can bring in Ms. Faye, and she has an independent recollection that would impeach Mr. Ortega as to those two statements.

Judge. And she'll say that, yes that information came from Mr. Ortega.

Ms. Bina. Right. At that point --

Judge. She hasn't said that yet.

Ms. Bina. Right. So it's possible -- she said that at deposition, your honor, so there's reason to believe that she will say that. Again, that's not grounds for getting the texts in. It might be grounds for getting her testimony in.

Ms. Chang. I think we're fighting --

Ms. Bina. Can I finish please, Ms. Chang?

Judge. Ms. Chang, let her finish. **(HERE WE GO, JUDGE DID SPEAK UP BUT FOR BINA)**

Ms. Chang. This helps her. We're not trying to get the texts into evidence. I think she thinks we are.

Judge. I thought you were, too.

Ms. Chang. No, no, no, no, no. The code doesn't allow us to get the texts in, it allows us to read from it.

Judge. If it's past recollection recorded, you haven't gotten that analysis yet.

Ms. Bina. Which is what I'm getting to. They're not allowed to get in the texts or read from the texts. Ms. Faye, conceivably, could impeach Mr. Ortega as to the two statements he specifically denied. I would argue, your honor, that at that point, the testimony is cumulative and collateral because Ms. Faye repeatedly said on the stand, said Mr. Ortega was pressuring Mr. Jackson --

Ms. Chang. No, she was not.

Ms. Bina. She actually did say that. She was allowed to testify considerably to this. She wasn't allowed to give any hearsay testimony.

Ms. Chang. No.

Ms. Bina. But as to those two statements, your honor, if Ms. Faye has a recollection that impeaches Mr. Ortega, they would not be hearsay. The remaining four statements are hearsay with no exception, because Mr. Ortega never denied them, and plaintiffs never asked the questions that would lay the foundation for prior inconsistent statements. So we're only dealing with the two statements, not the six. So then we talked about the two statements --

Judge. The two statements where there was negative responses?

Mr. Putnam. Yes, your honor.

Ms. Bina. With a negative response.

Judge. It wasn't a "do you recall," it was a direct "yes."

Ms. Bina. It was a direct "yes" or "no," which is "he has to be forced to face his fears" and if --

Judge. Loses.

Ms. Chang. "Loses everything."

Ms. Bina. "He loses everything, including his kids." and, again, actually, that one is not actually an inconsistent statement, if you go by what the text says. The text says -- doesn't attribute an author to that. Mr. Ortega was asked, "did you ever tell Karen Faye that AEG Said that?" it's possible that Mr. Ortega said it to Karen Faye without it being from AEG They didn't ask that question. So in any event, Ms. Faye might have an independent recollection that impeaches on those two statements alone. The other four, there's no basis for admission whatsoever. Then we get to the second question of, well, can she read from the texts as to those two statements? And the law is very clear that that is not permissible; that past recollection recorded, two things have to happen first: first, the witness can have no independent recollection. Ms. Faye has testified under oath that she remembers specifically everything that happened.

Judge. Did she say that in trial or in the depo?

Ms. Bina. She said that in the trial.

Mr. Putnam. In trial.

Ms. Bina. She had the text in front of her, and she said, "I remember. I don't need the texts. I remember specifically what happened on June 18th." now, it's possible they'll bring her back in, and she'll magically forget all that. But she testified to all that repeatedly under oath at her deposition and elsewhere.

Mr. Putnam. At trial.

Ms. Bina. So I don't have any reason to believe she will suddenly have a lapse of memory, requiring her to read these two texts. So first the witness has to have no recollection at all. Then -

Judge. And if she doesn't, you refresh.

Ms. Bina. Then you refresh. Exactly, your honor. And the law is very, very clear, and we cited the authorities in our opposition papers, that if the witness is refreshed and then can testify, then you don't get it in as a past recollection recorded.

Judge. Right.

Ms. Bina. Only if, after attempting to refresh, the witness still has no memory of what happened, then you can read from the document.

Judge. And that's usually only in the case where it's such a lengthy document, such a lengthy list of something, that nobody can possibly retain it just by reading it on the stand. That's usually how it happens.

Mr. Putnam. And how we've done it in this trial.

Ms. Bina. Right. The problem here, your honor, is that reading from the document as to those two statements wouldn't actually impeach Mr. Ortega, because the document doesn't attribute them to Mr. Ortega. So we have this sort of convoluted situation here where there's text messages that they're basically trying to get in to bolster Ms. Faye's credibility, which they can't do unless it's challenged. And there's no grounds for admitting at least four of the six statements in question. Again, Ms. Faye might have a recollection that might contradict Mr. Ortega's denial on two specific statements, and they could potentially bring her in, ask her those two questions. She can testify as to her recollection. If we then challenged it, then she might get it in, in part, as an inconsistent statement. But that's the only way the text would ever come in.

Mr. Panish. Clearly comes in --

Ms. Bina. Not past recollection recorded unless she can't remember it. And even, after being refreshed on it, can't remember it actually happening, at which point then I suppose you could read it in, but it would have to be actually inconsistent, and it's not. So that's --

Judge. I would be surprised, because it's one sentence, how you would not remember. How could you not be refreshed?

Ms. Bina. Particularly since she said it multiple times, including under oath, and testified a month ago that she could remember specifically everything, and the text only clarified the dates for her. Then turning to the last issue, your honor, which is the forensic examination of the text. Since I don't think there's any basis to admit the texts, I don't think there's any need to go through forensically examining them. But there is a concern here. Ms. Faye was subpoenaed in two different cases. She came -- she brought documents to her depositions, including documents that, you know, showed that she was concerned about Mr. Jackson that she sent to Mr. Dileo saying he was thin, and he was sabotaging himself, and so on and so forth. She didn't bring the texts. She didn't bring the texts in at all. She didn't bring them when she first testified at trial. She instead brought them on her second or third appearance and said, "oh, I've suddenly found the texts." well, again, your honor, we'd ask the opportunity to examine, if your honor was inclined to admit the texts, because it's suspicious when they were discovered. It's also very, very easy to fake. You only have the printout of the texts. And as your honor will recall, we went away at lunch and figured out exactly how easy it is to change the dates on an iPhone conversation, and

it's super, super easy. Takes two minutes. So we'd like the opportunity to prove that hadn't been done. And, again, there is some reason to doubt Ms. Faye's --

Mr. Putnam. Veracity.

Ms. Bina. Ms. Faye's here, because we know at least one instance she was selective in what she produced. She produced an e-mail for the plaintiffs' version of the case but not defendants, which is when --

Judge. The "yippee"?

Ms. Bina. Yes. "yippee," "everything's great."

Mr. Putnam. Same conversation.

Ms. Bina. And there's another e-mail in that same time period, your honor, where she says, "I'm very protective of Michael Jackson's image, and I'll do anything to protect it." so she's a witness who has a motive not -- she has, frankly, a motive to fabricate something. I'm not saying she did it, but I'm saying, before we put it to a jury, I'd like an opportunity to examine that, particularly when she didn't produce it in response to discovery, and she's been selective in what she's produced. But I don't think we need to deal with any of that, because the only two statements at issue aren't directly contradicted by the texts, so I don't think there are any grounds for ever getting to the texts. The only issue is whether Ms. Faye can come in and testify against Mr. Ortega as to the two statements he actually said "no" to. And that may be, but I think at that point, your honor, it's pretty irrelevant as to whether kenny ortega ever told her --

Judge. It's pretty marginal.

Mr. Putnam. So marginal, your honor.

Judge. Benefit is pretty marginal.

Ms. Bina. Very marginal.

Ms. Chang. But it's our --

Judge. I know it's your case. I think even if you get that, it's so marginal --

Ms. Chang. Do we want to leave the impression it's all hugs and kisses from AEG

Judge. We have enough of that impression.

Mr. Putnam. And, your honor, that's why --

Mr. Panish. Are we coming back at 1:30?

Judge. One thing, and then I have to let the staff go.

Ms. Chang. I'm so sorry, your honor. The thing about Karen Faye on the texts, we don't know until we lay the foundation. We were interrupted, we didn't do it, so we just don't know. The second thing, I just want to state this for Karen Faye because I think a lot of bad things have been said on the record. As an officer of the court, I went to get the phone from her. I asked her, "can you show me how you went and retrieved all this?" it was the most tedious thing. She had to go back all the way to 2009 and scroll down. There was no fabrication of any evidence there. I saw - - it must have taken her days to go back that far. And so with respect to that, I feel -- especially since she so gladly went over and said, "do any forensic analysis that you want to do." but it is degrading, it's humiliating. But with that said, why don't we all powwow, take a break, see where we are. I think we all agree that she's entitled to do something. We can lay foundation for other things, and then we can all discuss how marginal or helpful it would be over lunch.

Judge. That's what I suggest you do.

Mr. Putnam. Yes, because we don't agree --

Ms. Bina. But, your honor, I don't think there's really any room for debate. There's only two statements, and Ms. Faye can come in --

Judge. I'm done with the argument. I wanted to focus on the marginality of the benefit.

Ms. Chang. Let me --

Judge. Say this to Mr. Putnam.

Mr. Panish. When -- what are we going to work on this afternoon?

Ms. Chang. Statement of damages brief.

Judge. Statement of damages. And I guess to the extent we can finish this --

Ms. Bina. Should be able to.

Ms. Chang. Okay.

Mr. Panish. Okay.

Mr. Putnam. 1:45, your honor?

Judge. Yes. 1:45.

Mr. Panish. Okay. Thank you, your honor.

Ms. Bina. Thank you, your honor