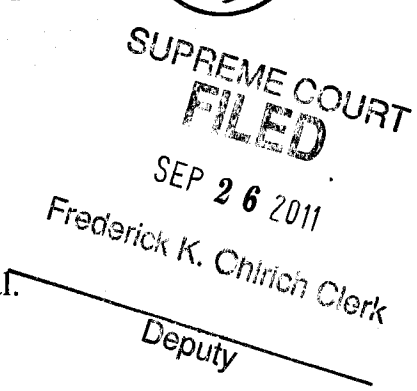
S191550

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA



SARGON ENTERPRISES, INC.,

Plaintiff and Appellant,

vs.

UNIVERSITY OF SOUTHERN CALIFORNIA, et al.

Defendants and Appellants.

SARGON ENTERPRISES, INC.'S ANSWER BRIEF ON THE MERITS

On Review from the Court of Appeal for the Second Appellate District,
Division One, 2d Civil Nos. B202789 & B205034

Appeal from the Superior Court for the State of California,
County of Los Angeles, Case No. BC 209992 (Related to BC 263071)
The Honorable Terry A. Green and Marvin M. Lager, Judges

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I.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff/appellant Sargon Enterprises, Inc. ("Sargon") asks for a favorable decision not merely for itself, but to validate the jury system that has been derailed twice since this case was filed more than 12 years ago.

Twice, trial courts precluded juries from considering any of Sargon's evidence of lost profits, instead imposing unprecedented and unrealistic standards for foreseeability, mathematical certainty, and expert qualifications. Each time, the Court of Appeal correctly reversed and remanded for a new trial on damages – the liability of defendant/respondent University of Southern California ("USC") for sabotaging Sargon's revolutionary new dental implant long since having been established.

Now USC asks this Court to immunize it from judgment day (literally). It raises a host of objections to Sargon's most recent attempt to establish its lost profits, through the testimony of forensic accountant and business valuation expert James Skorheim. These objections have no merit, as Sargon demonstrates below. More importantly, as the Court of Appeal correctly held, they go at most to the weight, not admissibility, of Skorheim's testimony. (Court of Appeal Opinion ("Opinion") at 19, 30-31.)

Whether Skorheim used an appropriate profit margin or correctly projected Sargon's future sales is a matter for "[v]igorous cross-

examination, presentation of contrary evidence, and careful instruction on the burden of proof," in the words of the seminal decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 502 U.S. 579, 596. It is not ground for that testimony's wholesale exclusion, especially as Skorheim provided a wide range of alternative damage scenarios, carefully broken down into their component parts so that the jury could evaluate the validity of each individual assumption and projection.

The jury never got that chance. The trial court abused its discretion, overstepping its bounds by applying the wrong legal standards and then by deciding for itself whether, for example, a particular competitor was sufficiently comparable to be a basis for calculating Sargon's lost profits.

Perhaps aware that the trial court impermissibly crossed the line from gatekeeper to gate-closer, USC in its Opening Brief ("OB") tries to move that line. USC inveighs in favor of such judicial activism by invoking the specter of runaway juries, overawed and misled by experts they cannot understand, returning outrageous verdicts that will either bankrupt industry and academia or else blackmail them into extortionate settlements, and bury the courts in an avalanche of post-judgment litigation and appeals.

In doing so, USC fixates on the highest number generated by the most optimistic of Skorheim's four alternative projections. It disregards the Opinion's conclusion that, at a bare minimum, the most conservative

calculation, beginning at $573,739 in 1998 and (like the others) calculating losses for each year thereafter, should have been presented to the jury because an award based on that projection "would have been supported by substantial evidence, not speculation." (Opinion 30.)

Perhaps more fundamentally, USC's parade of horribles is not supported by any evidence that juries are unfit to critically and carefully evaluate experts and their testimony. Nor does USC acknowledge the numerous protections ensuring that verdicts are supported by sufficient evidence (including orders for new trial or remittitur), let alone pre-litigation mechanisms available to keep high damage cases from ever reaching a jury (including contractual provisions prohibiting or limiting consequential damages, or requiring arbitration).

Sargon is entitled to have a jury determine its compensation for the injury caused by USC's already-proven sabotage of a revolutionary product that had generated several million dollars in sales even before that sabotage. No ground – legal or equitable – exists to deny that right.

II.

STATEMENT OF FACTS

A. The Sargon Implant.

In the late 1980s, Dr. Sargon Lazarof invented the Sargon Dental Implant ("Implant"). (9RT 1212:3-15; 10AA 2447:16-2453:22.) The Implant was a major advance over existing technologies.

In the 1960s and 1970s, Nobel Biocare's Dr. Branemark introduced "osseointegration," an innovative process by which, over several months, the jawbone and implant adhere, locking the implant in place. Nobel became the industry leader, controlling 40% of the market, and still retains a market-leading 23% share. (5RT K60:10-K62:18.)

Straumann later pioneered a process eliminating one of the two Branemark surgeries. This innovation made Straumann the market co-leader, with a 22% share, but its process still required two patient visits, separated by several months, so the implant could osseointegrate before being "loaded" with an abutment and crown. (5RT K62:19-K65:17; 9RT 1220:26:1221:16.)

Sargon's Implant is expandable. Instead of waiting for the bone to grow to it, the implant expands to the bone, providing stability before osseointegration. The dentist can "load" it the same day, giving the patient an immediately functioning tooth. (5AA 1242:5-1243:4; 10AA 2454:1-2455:13; 9RT 1213:16-1217:20, 1226:2-1228:26.) A true "immediate-

load" implant was considered the industry's "Holy Grail," and predicted to become the fastest growing industry segment. (7RT 317:4-319:4.)

B. The Clinical Trial Agreement.

In 1994, USC's Dr. Marwan Abou-Rass began using the Implant. (10AA 2463:18-2467:15, 2515:11-2517:21.) Impressed, he spoke to USC's Dean, Howard Landesman, who became interested. (10AA 2467:5-2469:6, 2519:23-2521:10, 2530:14-28.)

Lazarof wanted USC to use and teach the Implant. Landesman, however, said that USC would first have to conduct a clinical study. (9RT 1245:25-1246:4; 10AA 2468:7-2473:15, 2531:20-2535:5.)

The study was important to Sargon. Dentists are risk-averse and disinclined to adopt new technologies without assurances they are safe and effective. University studies provide such assurances. (5RT K110:3-K111:9; 31AA 7860:5-19, 7945:9-7947:7; 32AA 8116:23-8117:14; 36AA 9369:4-25.)

Sargon had planned a Los Angeles marketing symposium. Landesman induced Lazarof to cancel it, stating: "Give me one year" and "I will give you the world." Sargon then could present the same symposium, but *with* USC and the study results. (9RT 1246:5-1248:4; 10AA 2471:5-2472:7, 2536:7-2539:1.) That one-year period became a

critical component of the Clinical Trial Agreement ("CTA"), signed November 6, 1996. (7AA 1525-1586.)

The CTA required Sargon to pay $200,000 and USC to provide semi-annual reports. (7AA 1527-1528.) Publication of those reports was prohibited until "publication of the interim report at a 1 year level of follow-up." (7AA 1568, emphasis in original.)

USC appointed Dr. Winston Chee as Principal Investigator although Abou-Rass knew the Implant and was not as wedded to Nobel's competing implant. (10AA 2547:28-2548:28, 2549:20-2550:14, 2553:7-2555:10.)

C. USC Experiences Excellent Results, And Predicts The Implant's Widespread Adoption.

The one-year report – the first Sargon could use for marketing – was due in **February 1998**. (11AA 2866.) During that one year, USC's Dr. Hessam Nowzari told the FDA, USC experienced "a hundred percent" success rate. He called the Implant "the state-of-the-art and the best modality which can be offered to patients today." (11AA 2682:17-2683:20.) In February 1998, he wrote to "confirm the superiority of the Sargon Dental Implant to our present system (Branemark System)," and its introduction "at the USC School of Dentistry as the system of choice for patient care." (7AA 1786.)

Laudatory letters from Chee and Landesman followed. (7AA 1799, 1801.) Chee wrote that USC would use the Implant for "routine patient care" and predicted that, "with knowledge of our study and appreciation of the benefits of immediate loading of implants that all parties involved with Implant Dentistry will cho[o]se to use this Implant for patient care." (7AA 1799.)

D. The Monte Carlo Symposium.

In April 1998, USC sponsored a Symposium in Monte Carlo on Sargon's Implant. USC representatives made "quite positive" comments to approximately 400 attendees and it was announced that USC would soon publish the study results. (9AA 2132:5-24, 2227:9-2229:10; 10AA 2560:11-2561:13; 9RT 1254:27-1255:22; 11RT 2049:27-2053:12.) This generated interest from potential distributors. (5AA 1250:19-1251:2; 8AA 2046:1-2048:10, 2095:8-18.)

E. USC's Breaches.

USC then breached the CTA. Chee, who was receiving monetary honoraria from Sargon's biggest competitor (Opinion 9), produced no report until February 1999, *two years* after the start of the study. (10AA 2563:7-2566:9.) That report (7AA 1588-1595) was useless, neither mentioning USC nor, as required, "summarizing in customary clinical

format and detail the results of the work conducted under the Study." (7AA 1527.) USC's Abou-Rass was "appalled." (9AA 2209:18-2220:24, 2262:22-2266:10.)

After Sargon filed suit, Chee issued the *second* report, also not in the required format. (9AA 2217:22-2220:24.) That report purported to identify problems in some study patients, though no such problems were noted in the first, pre-lawsuit report and those patients had not been examined since the first report had issued. (5AA 1253:13-1254:6, 7AA 1597-1605.) Chee had invented these problems. When Chee produced the affected patients' records, they had been altered, as confirmed by a forensic chemist. (5AA 1255:8-1258:13, 1280-1283; 8AA 1931-1956; 10AA 2575:21-2662:10.)

F. The Damage To Sargon.

The lack of timely, usable reports was devastating. The Symposium and study announcement had generated great enthusiasm but, when no study results followed, Sargon lost credibility. (11RT 1811:12-28, 1833:17-27; 5AA 1251:9-13, 1276:21-1277:4, 10AA 2488:15-25, 2561:1-2562:15, 2571:14-2572:1; 43AA 11079:18-11081:6.)

U.S. dentists purchased fewer Implants. One delayed for five years before beginning its use, another completely stopped, while a third discontinued almost all use. (32AA 8104-8113; 32AA 8089:7-8091:20.)

Five dentists alone would have purchased a total of at least 825-925 more Implants had they received the study results, and several attributed resistance to the Implant from referring dentists to the lack of USC data. (*Ibid.*)

Sargon also lost sales overseas. Sargon's Japanese distributor had purchased over $1 million in Sargon products, but reported that the lack of USC data was causing "our customers to lose their interest" and that customers would not buy the Implant "if we don't have the USC report to support." (7AA 1728, 1751.) It refused to sign a longer-term contract requiring purchases of $5 million annually. (5AA 1259:11-1260:18.)

Sargon's former Saudi distributor had purchased over $2.66 million from Sargon. Without the reports, it refused to agree to a new contract requiring annual purchases of $2.5 million. (5AA 1261:4-1264:5; 7AA 1643.) Sargon had made more than $450,000 in sales in Korea (5AA 1262:27-1263:13) but could not finalize agreement with a new distributor that had committed to purchase $1 million of Sargon products annually because the Korean FDA would not issue an import license without "clinical data" demonstrating safety and efficacy. (5AA 1263:10-24; 7AA 1794, 1796-1797.) Sargon also lost potential distributors in Mexico, Turkey, England, Kuwait, and Lebanon. (3AA 641:17-643:13, 645:8-15; 5AA 1262:27-1264:18.)

III.

PROCEDURAL HISTORY

A. The First Trial.

Trial was in 2003. Though Sargon prevailed, its lost profits evidence was excluded as "not foreseeable." (1AA 177-192.) The Court of Appeal reversed and remanded for a new trial on damages. (Opinion 3.)

B. The 402 Hearing.

At the *Evidence Code* §402 hearing held on remand, Sargon presented over 5,000 pages of documentary evidence and testimony from Lazarof, industry experts Robert Pendry and Steven Hanson, and its damages expert, James Skorheim. Skorheim is a CPA, Certified Valuation Analyst, Certified Fraud Examiner, and Certified Forensic Accountant specializing in forensic accounting, business analysis, and damages analysis. He has testified on business valuation and/or lost profits in the medical and dental fields, among others, including in a case arising from the sale of a dental implant company. (4RT J12:5-J17:24; 13AA 3238-3247, 3278-3280; 43AA 11059:5-20.) No court has excluded his testimony based on criticism of his methodology or the appropriateness of his analyses. (4RT J19:14-J20:2.)

1. Skorheim's Market Share Methodology.

Skorheim predicted Sargon's anticipated growth and profits by measuring them against other dental implant companies he determined were comparable to Sargon. Based on his experience as a business valuation analyst, and his research on the implant market, Skorheim identified three factors that predict success: (a) an innovative product (b) supported by clinical data from a respected institution that validates the efficacy and safety of the implant, along with (to a lesser degree) (c) a focus on general practitioners. (4RT J28:2-J31:11; 2ART 41:22-42:3, 65:2-66:23.)[1]

Skorheim determined that the implant market is divided into two groups – companies that possess these three "drivers" and those that do not. He found that Sargon shares with the former a focus on innovation and clinically documenting the efficacy of its product and prepared a chart illustrating Sargon's comparability in these and other respects (including pricing, cost structures, distribution practices, and success rates). (1ART 4:28-6:9; 5RT K50:2-13, K56:12-K57:8; 40AA 10239-10240.)

Skorheim concluded that six implant companies were comparable to Sargon: Nobel Biocare, Straumann, 3i, Zimmer, Dentsply, and Astra-Tech.

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[1] "2ART" refers to the July 26, 2007 augmented transcript; "1ART" to the July 18, 2007 augmentation.

(5RT K50:2-K54:14; 40AA 10239-10240.) Sargon was not comparable to the other companies which compete, not by supporting innovative products with clinical studies, but by offering lower prices on "copy-cat" products. (5RT K50:2-13, K54:15-K56:18; 7 RT 324:1-27.)

2. Skorheim's Projections.

After identifying comparable companies, Skorheim concluded that Sargon would have attained similar success over time had it received timely USC study results establishing the Implant's safety and efficacy. (6RT 39:1-27; 7RT 301:21-302:9, 309:13-310:25; 8RT 746:18-752:8.)

He prepared four alternative profit projections. (13AA 3232-3236; 37AA 9484-9488.) Each began with Sargon's actual revenues in 1998, when Sargon had attained approximately .5% of the market. (8RT 608:2-14.) With the success of Monte Carlo, Skorheim concluded that, had Sargon obtained timely reports from USC, Sargon would have doubled its 1998 revenues, attaining a 1% share. (8RT 608:15-609:22.)

Skorheim's four scenarios then diverged, based on Skorheim's conclusion that the greater a product's innovation, the greater the likelihood of increased sales. (8RT 605:21-608:1.) Though USC's Table 1 (OB 11) merely lumps together the totals under each scenario, Skorheim was far more detailed and meticulous, as shown by the charts he prepared (appended hereto as Appendix A).

As Skorheim had reliable projections of market growth through 2009, he first calculated, under each alternative, profits lost each individual year from 1998-2009. (5RT K32:24-K33:9, K37:12-K41:28, 35AA 9028-9029.) He then calculated post-2009 damages, but discounted those damages because growth would slow as Sargon and the market matured, and Sargon's patents expired. (8RT 618:18-622:19; 13AA 3232-3236.)[2]

The jury would have used the first calculation if it found Sargon's level of innovation equal only to the least innovative benchmark company (Astra-Tech) and that Sargon would have attained a **3.75%** market share over 12 years. Here, lost profits for 1998 were $573,739. They grew thereafter as follows:

1999:	$1,325,078
2000:	$2,187,136
2001:	$2,928,125
2002:	$4,954,538
2003:	$6,302,887
2004:	$8,401,310

[2] Each scenario deducted anticipated costs. As USC notes, Skorheim adjusted his predicted profit margin, though USC fails to explain that he did so because he concluded that Sargon's initially high expenses and low profit margin would fall in line with the comparators as Sargon matured and sales grew. (8RT 612:14-617:27; 15AA 3734:21-25; 17AA 4224:14-4227:16, 4228:17-4230:15.)

2005: $10,981,177

2006: $14,208,419

2007: $17,700,450

2008: $21,841,350

2009: $26,503,125

This totaled $120,011,000 (after adjustments for interest and present value), plus a post-2009 loss of market share of $100,473,347. (8RT 628:15-632:27, 635:27-642:25; 13AA 3233.) Alternatives two through four also each began with the 1998 loss of $537,739. Each, however, projected higher yearly damages thereafter, which the jury could award if it concluded Sargon's innovation level was higher and would have led eventually to a market share commensurate with a different benchmark company – either 5% (Dentsply), 10% (3i) or 20% (Nobel/Straumann).

Skorheim's separate calculations for each year from 1998 through 2009 gave the jury the means to award lower amounts if it concluded the damages period would have ended earlier. For example, if it concluded that, by the end of 2001, Sargon's competitors would have counteracted the Implant's advantages, as validated by the USC study, it could have totaled the 1998-2001 figures. This would generate an award between $7,014,078 under scenario 1 (by which time Sargon would have attained a 1.75% share) and $24,382,454 under scenario 4 (a 7% share), depending on which comparison it found appropriate. (13AA 3233, 3236.)

C. The *In Limine* Ruling.

On July 31, 2007, the trial court issued its ruling excluding Skorheim's testimony in its entirety ("Ruling"). (21AA 5328-5360.) In so doing, it largely ignored the evidence that supported Skorheim's testimony. As for the evidence it did not ignore, it impermissibly weighed that evidence and found it lacking in probative value, despite acknowledging that, under *Evidence Code* §801(b), a trial court "must not weigh the probative value of the opinion." (21AA 5330.)

For example, it concluded that Skorheim's market share projections were not based upon Sargon's historical performance and instead "wildly beyond" past performance. (21AA 5333-5337.) In fact, Skorheim began his analysis with Sargon's historical performance, as the Court of Appeal recognized. (8RT 608:2-611:11; Opinion 30.) Moreover, Skorheim's most conservative scenario projected that Sargon would increase its market share over 12 years from the .5% already attained to only 3.75%. (8RT 636:5-641; 13AA 3233.)

The trial court also found that, measured by "objective business measures" (21AA 5339), the companies to which Skorheim compared Sargon were not comparable because they were large companies and Sargon was small. (21AA 5337-5339.) The trial court rejected the law, cited by Sargon, holding that comparability is a question for the trier of fact and is not limited to companies the same size as Sargon (*e.g.*, 17AA 4376-

4380) and that it was USC's misconduct that had prevented Sargon from growing (*ibid.*). It also rejected evidence that Sargon and Skorheim's comparables shared the key drivers that predict success, and that no other company shared those drivers. (5RT K50:2-K57:8; 1ART 4:28-6:9; 7RT 324:1-325:4; 21AA 5337-5339.)

The trial court chastised Skorheim for excluding from his comparison smaller companies that also "touted 'innovative products.'" (21AA 5336:19-22.) It disregarded the evidence that supported Skorheim's exclusion of these companies, including industry and third-party corroboration that these companies were not innovative and merely offered copy-cat products at lower prices. (8RT 711:8-716:25, 720:26-723:1; 37AA 9469:13-20, 9493; 11RT 1826:13-1831:26.)

Likewise, the trial court concluded that, because all manufacturers "pursue clinical studies," this "driver" was "meaningless for comparison purposes." (21 AA 5336:17-19.) It rejected Sargon's evidence that there is a significant difference between studies performed by independent institutions like USC and company-generated data that is not considered as credible. (5RT K99:23-K100:27; 11RT 1846:12-25.)

The trial court also chided Skorheim for not providing the jury with standards for comparing the innovativeness of Sargon's Implant and that of the comparator companies' products. (21AA 5343-5346.) It rejected Sargon's argument that both comparability and innovation were questions

of fact for the jury (16AA 3873, 3878-3880) and that Sargon's other witnesses, including experts in the implant industry, would provide that guidance (21AA 5315-5316, 5319).

The trial court also ruled that, despite Skorheim's 25 years' experience as a CPA and business consultant, multiple certifications in business analysis and forensic accounting, and expert testimony in more than 100 cases including many involving high-tech industries, healthcare and even a dental implant company specifically (4RT J12:5-J17:24; 13AA 3238-3247, 3278-3280; 43AA 11059:5-20), Skorheim was not qualified to opine as to the factors that create sales growth in the market. (21AA 5350.)

D. The Judgment.

To address USC's claim that Skorheim's analysis was not grounded in Sargon's historical performance, Sargon sought during the §402 hearing to have Skorheim present an alternative calculation that did not involve predictions of market share based on "drivers" such as innovation, but instead would have taken Sargon's 1998 revenues and applied a growth rate based upon industry projections for future sales of immediate load implants. (5RT K5:24-K:6:27.) The trial court refused to permit it, terming this a "sea change in opinion that I am not going to allow." (5RT K14:18-K16:9.)

Given the exclusion of the only expert to quantify Sargon's lost profits, Sargon stipulated to Judgment. (21AA 5366-5370.)[3]

E. The Opinion.

The Court of Appeal reversed and ordered a new damages trial. (Opinion 2.) The majority comprehensively detailed Skorheim's research, analysis, and methodology, and the testimony of the other witnesses at the §402 hearing. (*Id.* 21-26.) It noted USC's arguments (*id.* 20-21, 26, 29), but found them "unconvincing" (*id.* 30).

Citing well-established law that, "'[w]here the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty'" and that damages may be "'an approximation'" (Opinion 19, italics in Opinion), the Opinion rejected the arguments that comparison companies must be "identical in all respects" or that the factor of innovation cannot be used to calculate lost profits simply because it "is not easily converted into dollars and cents." (Opinion 30.) "[E]xactitude is not required" (*ibid.*), particularly "'where, as here, it is the wrongful acts of the

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[3] USC suggests that Sargon could have sought to prove lost profits from specific foregone sales such as anticipated sales to the foreign distributors (OB 15) but neglects to note that the trial court (in previously granting summary adjudication) had found (albeit erroneously, in Sargon's view) Sargon's evidence in that regard insufficient to get to the jury and largely inadmissible. (12AA 3117-3118.)

defendant that have created the difficulty in proving the amount of loss of profits.'" (*Id.* 19.)

The Court found that "Skorheim's expert opinion was based on 'economic and financial data, market surveys and analyses, business records of similar enterprises, and the like,'" all well-recognized bases for calculating lost profits. (Opinion 30.) Likewise, the Court held, Skorheim "also considered Sargon's historical financial data." (*Ibid.*) "The trial court's criticisms of Skorheim's proffered testimony," all of which the Court had "carefully reviewed," went to weight rather than admissibility and "were better left for the jury's assessment." (*Id.* 30-31.)

The dissent neither reviewed Skorheim's testimony itself nor disagreed with the majority's description of Skorheim's methodology. (Opinion 30.) Instead, it quoted at length the majority's summary and quotation of the trial court's ruling (Dissent 4-6) and concluded that the lower court's decision "on an evidentiary issue over which he and he alone should have decisional authority" must be affirmed under the deferential abuse of discretion standard. (*Id.* 7.)

The dissent did not address or distinguish the law, cited by the majority, that "'[t]echnical arguments about the meaning and effect of expert testimony on the issue of damages are best directed to the jury.'" (Opinion 19.) Instead, it asserted that "[w]here, as here, an expert testifies using a methodology not previously sanctioned by any court to calculate

lost profits for an unestablished business, the trial court's discretion to exclude evidence that it deems speculative should not be disturbed on appeal." (Dissent 8, emphasis added.)

In fact, as the majority noted, Sargon had been in business since 1992 (Opinion 4) and had millions of dollars in sales, including nearly $1.8 million in 1998 alone. (Opinion 23.)[4] Furthermore, other courts have "sanctioned" the market share methodology which, as Skorheim testified, is used where one seeks to predict the success that a plaintiff would have achieved if not for a defendant's wrongdoing. (4RT J19:14-J20:11, J27:12-21.) *See, e.g., Dolphin Tours, Inc. v. Pacifico Creative Service, Inc.* (9th Cir. 1985) 773 F.2d 1506, 1508-1509, 1511-1513.[5]

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[4] USC (OB 24-25) and the dissent (Dissent 3-4) cite *Grupe v. Glick* (1945) 26 Cal.2d 680, 692-93 for the proposition that courts are wary of predictions concerning "newer businesses that are not yet established." But *Grupe* in fact holds that lost profits "dependent on future events" are recoverable "where their nature and occurrence can be shown by evidence of reasonable reliability." 26 Cal.2d at 693. That evidence was presented here.

[5] Though there are significant differences between California and federal law regarding expert testimony, USC cites to numerous cases decided under F.R.E. Rule 702. These cases offer little assistance given the stricter standards for expert testimony expressly articulated by Rule 702. However, because USC has scoured the federal database for cases it believes support its cause, Sargon cites other federal cases to demonstrate that, even under this stricter standard, testimony like Skorheim's is admissible.

IV.

THE TRIAL COURT ABUSED ITS DISCRETION BY EXCLUDING SKORHEIM'S TESTIMONY

A. Standard Of Review.

The exclusion of expert testimony is normally reviewed for abuse of discretion (Opinion 19), but that standard applies differently when, as here, it is the expert's conclusions, rather than his qualifications, that are challenged. *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1119 n.9. In that situation, the standard more closely resembles that used for a nonsuit:

> [I]f an expert's opinion on causation would (if credited by the jury) provide legally sufficient support for a finding in the plaintiff's favor on the issue of causation, it would be an abuse of discretion to strike that testimony. We therefore examine the ruling giving to [the] opinion all the value to which it is legally entitled [and] indulging every legitimate inference [that] may be drawn from the [opinion] in [Jennings's] favor. (Citations and internal quotes omitted.)

As to USC's insistence that Sargon show a "miscarriage of justice" (OB 17-18), "such a miscarriage of justice occurs when, after an examination of the entire record the appellate court is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in absence of the error." *Loftleidir Icelandic Airlines, Inc. v. McDonnell Douglas Corp.* (1984) 158 Cal.App.3d 83, 96;

see *also Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 439-440 (trial court's exclusion of defense expert's cost calculation in action alleging below-cost sales was prejudicial error because "[c]ost was *the* issue of this litigation" and exclusion was "tantamount to the court directing a verdict against the [defendant]," italics in original).

Here, "*the* issue" on remand was lost profits. (Opinion 3.) Skorheim was the only expert to quantify those profits. Exclusion of his testimony left Sargon with no way to prove its damages. The trial court's ruling was, *a fortiori*, prejudicial error.

B. Skorheim's Methodology Was Consistent With California Law.

The trial court ruled that Skorheim's methodology was unsupported by, and inconsistent with, California law and excluded Skorheim's testimony primarily on that basis. (21AA 5329.) The trial court's ruling, and USC's attempt to defend it here, misstate the law and misconceive trial courts' roles in evaluating expert testimony.

1. The Law Recognizes Many Approaches To Calculating Lost Profits.

For over 100 years, the U.S. Supreme Court has warned against imposing rigid rules of proof of the amount of damages when the fact of damage is clear:

> Our willingness to accept a degree of uncertainty in these cases rests, in part, on the difficulty of ascertaining business damages as compared, for example, to damages resulting from a personal injury or from condemnation of a parcel of land. The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation. But our willingness also rests on the principle articulated in cases such as *Bigelow*, that it does not "come with very good grace'" for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted.

J. Truett Payne Co. v. Chrysler Motors Corp. (1981) 451 U.S. 557, 566, *quoting Hetzel v. Baltimore & Ohio R. Co.* (1898) 169 U.S. 26, 38-39.

This Court agrees. *Clemente v. State of California* (1985) 40 Cal.3d 202, 219 (an injured person should "not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered").

Yet despite this well-established flexibility, one would conclude from USC's brief that there are only three recognized and approved means of calculating lost profits: the plaintiff's own historical performance;

comparisons to comparable businesses; and various "pre-litigation projections, computations from contracts, market surveys, and econometric analyses." (OB 27-28.) Indeed, the Ruling demands use of only one or the other of the first two methods. (21AA 5358.) But neither USC nor the Ruling cites any authority limiting the computation of lost profits to these methods, and none exists.

To the contrary, courts have approved a wide variety of methods for calculating lost profits. *See, e.g., Humetrix, Inc. v. Gemplus S.C.A.* (9th Cir. 2001) 268 F.3d 910, 919 (affirming $15 million award of lost profits in domestic market based on experience of defendant (not plaintiff) with similar product in foreign markets); *Northeastern Tel. Co. v. AT&T* (D. Conn. 1980) 497 F.Supp. 230, 247-249 *reversed and vacated in part on other grounds* (2d Cir. 1981) 651 F.2d 76 (prediction of one-third market share adequately supported by data from other industries with similar monopoly situations); *LePage's Inc. v. 3M* (3d Cir. 2003) 324 F.3d 141, 165 (prediction of 1% annual shift in market share for private label tape adequately supported by growth rate of other private label products and defendant's own growth projections); *DSC Communications. Corp. v. Next Level Communications* (5th Cir. 1997) 107 F.3d 322, 329-330 (assumptions about number of households that would adopt new telecommunications technology and that plaintiff's unfinished product would capture 40% of

that market adequately supported by data from "respected sources in the telecommunications market").

There is – and can be – no finite list of ways to calculate lost profits because, by definition, each case depends on its unique facts. Moreover, even if Skorheim had used a novel methodology (which he did not)[6], that would not justify its exclusion. *See, e.g., Pan Asia, supra*, 74 Cal.App.4th at 437 (expert's testimony should have gone to jury, even though his methodology "may lack an express sanction in California" and was not explicitly endorsed by any "reported California decision").

Whether any particular methodology is appropriate is "a factual question for the jury." *People ex rel. Dep't of Transp. v. Clauser/Wells Partnership* (2002) 95 Cal.App.4th 1066, 1083; *see also Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 47 Cal.App.4th 464, 489 ("criticisms of an expert's method of calculation is a matter for the jury's consideration in weighing that evidence").

The trial court not only misapplied the law and misconceived its role, it also ignored and misstated the evidence. The trial court concluded that Skorheim's projections were not based on "actual historical financial

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[6] Skorheim's market share methodology has been recognized by various courts. *See, e.g., Dolphin Tours, supra*, 773 F.2d at 1511; *LePage's, Inc., supra*, 324 F.3d at 165 (approving "lost market share" method of calculating lost profits); *see also* Hovenkamp, *Federal Antitrust Policy* (4th ed. 2011), §17.6b2 (cited by USC at OB 39), and cases cited therein.

results or comparisons to similar companies," but instead "on assumptions without reasonable factual foundation." (21AA 5329, 5333, 5336, 5343.) As the Court of Appeal correctly held, and as Sargon demonstrates below, these conclusions are not supported by the evidence. (Opinion at 30.)

2. Skorheim Considered Sargon's Historical Performance.

USC insists in this Court, as it did below, that Skorheim ignored Sargon's historical performance and allegedly conceded that it was not "relevant" to his analysis. (OB 30-32.)[7]

USC continues to misapprehend, intentionally or otherwise, what Skorheim did and said. Extrapolation from the plaintiff's historical results is one method of measuring lost profits; predictions based on comparable companies is another. *Parlour Enterprises, Inc. v. Kirin Group, Inc.* (2007) 152 Cal.App.4th 281, 288. Skorheim included elements of both methods in his analysis.

While Sargon's historical sales would not have a direct impact on his market share projections because those were based on comparable companies, Skorheim stated clearly that Sargon's historical results did

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[7] Indeed, USC made this statement so often below that the trial court attributed the words "not relevant" to Skorheim although Skorheim never uttered that phrase. (21AA 5335:1-15.)

"certainly fit into the calculus of market share" and were "meaningful in other aspects to the analysis." (13AA 3307:23-3308:10.)

As Skorheim testified, "my starting point, again, was to look at Sargon's financial history, their actual financial history and cost structure." (8RT 612:22-24; *see also* 8RT 609:25-610:5 [asked if he used Sargon's "actual financial history," Skorheim answered: "Certainly, yes."]; 8RT 611:4-11 ["incorrect" to say he "never looked [at] or used" Sargon's financial history; he "definitely considered ... that historical financial information"]; 8RT 637:2-638:4 [Sargon's "historical financial records" were "my starting point"].) It was based on such evidence that the Opinion correctly held that Skorheim "also considered Sargon's historical financial data." (Opinion 30.)

USC contends that Skorheim "departed from historical analysis" in "arbitrarily" projecting that Sargon would have doubled its 1998 sales and achieved a 1% market share within a year, followed by increased sales thereafter based upon the experiences of the comparison companies. (OB 31.) These opinions are neither arbitrary nor "speculative" (OB 32); they are amply supported by the evidence.

USC ignores, for example, evidence that the Monte Carlo Symposium had generated substantial excitement and inquiries from potential distributors, but that international customers declined to make further purchases and potential distributors declined to sign on when not

provided with the USC reports. (3AA 560:2-561:4, 641:17-643:13, 645:8-15; 5AA 1261:4-1264:23; 7AA 1728, 1643, 1794, 1796-1797; 8RT 660:5:21.)

USC ignores the testimony from individual dentists that they would have substantially increased their purchases if they had been given the study results. Five dentists alone would have purchased a total of at least 825 to 925 more Implants over several years; another stopped buying due to USC's breach. (31AA 7870:3-7871:5; 32AA 8104-8113, 8089:7-8091:20.)

USC ignores the testimony of industry executives that "an innovative implant product that has a successful clinical study from a prestigious university will create enormous growth in sales" (5 RT K133:23-K134:3) and that a company at Sargon's level in 1998 could expect a "doubling and tripling effect" on sales for several years by supporting an innovative implant with positive clinical study reports (4RT J161:2-17). It ignores the testimony of oral surgeon Dr. Alan Kaye that Sargon's Implant would have sold very well if supported by USC's study reports. (32AA 8116:9-8118:10.)

USC also ignores its own admissions. Chee and Nowzari wrote that the "sales of [Sargon's] implant" would "benefit immensely" from the April 1998 Symposium (7AA 1769), after which USC was to release the overdue report (Opinion 6). Chee believed those study results would cause "all parties involved with Implant Dentistry" to use Sargon's Implant.

(7AA 1799.) As USC concedes (OB 28), such "pre-litigation projections" can be used to predict profits.

Skorheim's 1998 sales projection was likely conservative. As USC and the industry experts recognized, Sargon's Implant, once supported by the USC data, was likely to grab a large share of the market. This presumably explains why Nobel, which had an exclusive contract (and a market-leading position) it stood to lose if USC validated Sargon's Implant (Opinion 4), plied Chee (and USC) with monetary donations and honoraria (*id.* 9) in the apparent hope, ultimately realized, that Chee would sabotage the study (*id.* 30), refuse to publish the contractually-required reports, and alter patient records to create non-existent problems.

Skorheim's adjustment of Sargon's anticipated profit margin likewise has a valid foundation. As a young company, Sargon's general and administrative expenses were disproportionately high and would, Skorheim believed, decline on a percentage basis as sales grew, as typically occurs. Skorheim therefore adjusted the profit margin by reference to companies to which he found Sargon comparable. (8 RT 612:14-617:27; 15AA 3734:21-25, 3736:17:25; 17AA 4224:14-4227:16, 4228:17-4230:15.)

Berge v. International Harvester Co. (1983) 142 Cal.App.3d 152, 162-163, rejecting use of a national industry average for net profits, is inapposite. Skorheim did not employ a national average. He based his anticipated profit margin on the experience of the companies to which he

found Sargon, after considerable research, most comparable. (8 RT 612:14-617:27; 15AA 3734:21-25.) Of those companies, profit information was available for Straumann and Nobel and, as both had a 30% margin, Skorheim applied that margin. (8RT 615:19-616:15.)

Whether that adjustment (or any of Skorheim's other conclusions) was appropriate should have been for the jury – not the trial court – to decide. *E.g.*, *R.I. Spiece Sales Co., Inc. v. Bank One, N.A.*, No. 1:03-CV-175 (N.D. Ind. April 12, 2006) 2006 WL 978979, **5-6 (business owner could calculate lost profits using 5% profit margin although historical margin was smaller; "whether the claimed 5% profit is too high given the historical data and the adjustments made ... can be explored on cross-examination").

3. Skorheim Predicted Profits By Analyzing Companies Comparable To Sargon.

USC also asserts that Skorheim's analysis did not use companies comparable to Sargon. (OB 32-39.) USC asks this Court to create an overly rigid test of comparability not supported by the case law, and ignores the substantial evidence supporting Skorheim's choice of comparison companies.

a. Evidence Of Comparability Is Not Limited To "Objective Business Measures."

At USC's urging, the trial court ruled that Skorheim could rely upon only those companies similar to Sargon as it existed in 1998, with similarity measured solely by such "objective business measure[s]" as size, budget, sales, capitalization, and employee headcounts. (21AA 5337-5339.)

USC's cited authorities do not articulate any such rigid guidelines; they speak only in generalities of "substantial similarity,"[8] "similar businesses operating under similar conditions,"[9] "sufficiently similar" businesses,"[10] or "closely comparable" businesses "as nearly identical as possible" (*G.M. Brod & Co. v. U.S. Home Corp.* (11th Cir. 1985) 759 F.2d 1526, 1538-1539).[11]

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[8] *Kids' Universe v. In2Labs, Inc.* (2002) 95 Cal.App.4th 870, 886.

[9] *Berge, supra,* 142 Cal.App.3d at 162-163.

[10] *Parlour Enterprises, supra,* 152 Cal.App.4th at 290.

[11] Hovenkamp, *Federal Antitrust Policy* (4th ed. 2011), §17.6b2, n.23, also cited by USC (OB 39), in fact cites case law holding that an expert need only show the comparators are "reasonably comparable." *Metrix Warehouse, Inc. v. Daimler–Benz Aktiengesellschaft* (4th Cir. 1987) 828 F.2d 1033, 1044, n.21; *see also National Farmers' Org. v. Associated Milk Producers, Inc.* (8th Cir. 1988) 850 F.2d 1286, 1294-1298 (approving comparison to different geographic region notwithstanding numerous differences). *Gerwin v. Southeastern Cal. Ass'n of Seventh Day Adventists* (1971) 14 Cal.App.3d 209, 222, also cited by USC, does not limit comparability to "objective business measures" either. There, the plaintiff's comparison was rejected because it relied on different businesses (hotels vs. bars) in different locales (Riverside vs. Los Angeles).

In determining comparability, courts also consider subjective criteria. *E.g., Simo v. Mitsubishi Motors North America, Inc.* (4th Cir. 2007) 245 Fed.Appx. 295, 2007 WL 2332349, **2, 5 (upholding award to soccer player who suffered disabling injuries based on testimony from sports agent that player "was destined to become one of the top American players of his generation," would have played for 15 years, and earned between $3 and $10 million, calculated by reference to comparable players; rejecting criticism that opinion was not based on "objective sources or outside information").

For its argument that Skorheim's comparables were insufficiently similar, USC continues to rely on *Parlour Enterprises*. (OB 37.) There, the expert projected profits for three proposed but never-opened ice cream parlors based on the experience of a publicly-traded chain of 300 restaurants, simply because the latter offered both food and ice cream. *Parlour, supra*, 152 Cal.App.4th at 290. This obvious lack of similarity was compounded by the expert's "cursory" description of the comparator's business model. *Ibid.*

By contrast, Sargon was an established company that had made millions of dollars in sales, achieved profitability, attained .5% of the market, and had a product that all – including USC – agreed was revolutionary and destined to capture a large segment of that market. (5AA 1261:4-1263:13; 7AA 1643, 1703; 21AA 5337:21-23; 5RT K5:24-K6:1.)

It was nothing like the three stillborn *Parlour* restaurants. Moreover, unlike the "cursory" description provided by the *Parlour* expert, Skorheim and the other §402 witnesses exhaustively described the businesses of the comparators and how they compared to Sargon.[12]

The Opinion correctly concluded that this case is far closer to *Palm Medical Group, Inc. v. State Comp. Ins. Fund* (2008) 161 Cal.App.4th 206. (Opinion 29-30.) In *Palm*, the court reinstated a jury's lost profits award to a plaintiff excluded from a healthcare provider network. *Id.* at 210. The expert took the average gross revenue of the top four or six providers in the area (not Palm's historical revenues), and predicted Palm would earn 50% more. *Id.* at 227. Defendant argued the projection was "speculative" because the expert did not have enough information about the other providers and their practices to conclude they were comparable to the plaintiff. *Ibid.*[13]

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[12] *E.g.*, 4RT J41:7-27, J72:24-J78:6; 5RT K50:2-K54:14, K56:12-K57:8, K60:10-K65:17, K101:13-K105:6; 6RT 28:26-29:24, 43:6-46:13; 7RT 303:25-305:24, 316:2-317:12, 428:18-429:1, 435:1-438:2; 9RT 1219:10-1221:16; 11RT 1815:15-1823:2, 1834:5-1849:7.

[13] This belies USC's unsupported assertion that the *Palm* expert compared "companies of roughly similar size." (OB 38.) Nowhere in the opinion is Palm identified as being of "similar size" to the comparators; in fact, the opinion states that the expert knew the identity of only the market leader (because he relied on discovery from defendant, which concealed the others' identities). 161 Cal.App.4th at 227.

The Court disagreed, citing evidence that Palm offered similar medical services and had the capacity to serve a similar volume of patients. *Palm, supra*, 161 Cal.App.4th at 227-228.[14] *See also Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes* (2010) 191 Cal.App.4th 435, 473-474 (not speculative for expert to project $160 million in future profits for never-built condominium/hotel complex).

This case not only is closer to *Palm* than *Parlour*, as the Opinion found, it presents even stronger evidence of comparability than *Palm* did. In *Palm*, lost profits were awarded because plaintiff's existing services were similar to its comparators. 161 Cal.App.4th at 227. Sargon's Implant was indisputably better than its comparators (11RT 1814:11-1815:14), as USC itself confirmed (7AA 1786). The jury should have been given the opportunity to decide whether Skorheim's comparables were sufficiently similar, as explained below.

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[14] The dissent criticizes the Opinion for determining that *Palm* is more apposite than is *Parlour*, insisting that the trial court – not the appellate court – should determine which precedent is on point and which is not. (Dissent 6-7.) This assertion is mystifying. It would rewrite the California Constitution (Cal. Const., Art. VI, §§1-3) and put appellate courts – including this one – out of business.

b. "Comparability" Is A Question of Fact, For The Jury.

The trial court not only applied the wrong legal standard of "objective business measures" to determine comparability, it erred by taking the question from the jury. The comparability of an expert's benchmarks presents "fact questions" for the trier of fact. *S. Jon Kreedman & Co. v. Meyers Bros. Parking-Western Corp.* (1976) 58 Cal.App.3d 173, 185.

The choice of benchmarks is a matter for cross-examination, contrary testimony, and argument, not wholesale exclusion of the testimony. As explained in *Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 469-470:

> [T]he method of calculation selected by [the expert] simply goes to the weight to be given [his] expert opinion evidence. It is for the trier of fact to accept or reject this evidence ....

Courts have repeatedly held that it is for the jury, not the trial court, to determine what is comparable and what is not. *Redevelopment Agency of San Diego v. Attisha* (2005) 128 Cal.App.4th 357, 374 (reversing exclusion of testimony valuing plaintiff's San Diego business by reference to businesses outside San Diego; criticism went to "weight ... rather than ... admissibility"); *City of San Diego v. Rancho Penasquitos Partnership* (2003) 105 Cal.App.4th 1013, 1041-1042 (reasonableness of expert's

comparison of plaintiff's property to properties "upzoned" for higher density uses was for jury); *Syufy Enters. v. American Multicinema, Inc.* (9th Cir. 1986) 793 F.2d 990, 1003 ("It was for the jury to consider ... the validity of the comparison" between movie theaters in San Jose and Phoenix "and to adjust its damage award accordingly").[15]

Every one of the criticisms USC launches at Skorheim's analysis could, and should, have been made to the jury instead. The trial court, by depriving the jury of the ability to weigh the comparability of Skorheim's benchmarks, plainly abused its discretion.

c. Industry Leaders May Be Used As Comparators For Smaller Companies.

Obviously aware of the vast case law holding that comparability is a question of fact for the jury, USC argues that it is unreasonable, as a matter of law, to compare Sargon to companies that may have started small but since have grown to be the industry leaders. (OB 35-36.)

USC argued, and convinced the trial court to hold, that comparability is measured exclusively by a narrow set of objective

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[15] Commentators too recognize that comparability is a question for the jury: "The weighing of evidence of comparable experience should be left to the trier of fact. Relevant and probative evidence should not be excluded in an area as difficult as this one." R. Dunn, *Recovery of Damages for Lost Profits* (6th ed. 2005) §5.12, pp. 447.

financial criteria. (21AA 5338-5339.) This limited definition of comparability is not the law, as demonstrated above. *See* Section IV.B.1, *supra*. But USC went further, inducing the trial court to hold that these objective business measures must be shared by plaintiff and its comparators at the time of the injury caused by defendant. (21AA 5338-5339.) Were this actually the law, no young business's lost profits could ever be calculated by comparison with larger or more-established companies.

Of course, that is not the law. First, requiring that comparability be measured by objective business metrics, especially as of the time of the original injury, ignores the fact that it sometimes is the defendant's conduct that prevents a small company from becoming larger.

For example, in *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 896-897, a small company was unjustifiably forced into bankruptcy by its bank. The jury awarded lost profits, established by expert testimony based in part upon a comparison with other companies in the field, including industry giant Honeywell. 38 Cal.3d at 907. Defendant challenged the comparison because of plaintiff's "far smaller financial resources," but this Court found the comparison proper because defendant had prevented plaintiff from growing into a larger business. *Id.* at 908. Any other result would reward, rather than penalize, the wrongdoer for its misdeeds. *Ibid.*

Second, as illustrated by *Sanchez-Corea*, courts do uphold lost profits calculated by comparison with companies much larger than the victimized plaintiff. USC claims to be "unaware of a single published decision holding admissible expert testimony that a tiny start-up would have grown into a market leader hundreds or thousands of times larger." (OB 36.) Yet USC itself cited such a case (at OB 28) – the *ID Security Systems Canada v. Checkpoint Systems* litigation.[16]

That litigation arose from plaintiff's attempt to sell security tags in competition with defendant Checkpoint. Plaintiff contracted to obtain tags from Tokai but Checkpoint interfered with that contract. Plaintiff's economist projected that, absent the interference, plaintiff would have increased sales from 16 million units in 1996 to 135 million units in 1997, and 332 million units by 2008 – an **840%** increase the first year, and more than **2,000%** over 12 years. He predicted plaintiff would have sold as many tags as defendant, the market leader. *ID Security Sys. I, supra*, 198 F.Supp.2d at 612-613.

The Court rejected Checkpoint's pretrial *Daubert* challenge, explaining that the expert was not bound by the plaintiff's historical

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[16] *ID Security Sys. Canada, Inc. v. Checkpoint Sys., Inc.* (E.D. Pa. 2002) 198 F.Supp.2d 598 ("*ID Security Sys. I*"); *ID Security Sys. Canada, Inc. v. Checkpoint Sys., Inc.* (E.D. Pa. 2003) 249 F.Supp.2d 622 ("*ID Security Sys. II*").

performance and instead could predict exponentially-increased sales because the contract "provided [plaintiff] with a new business opportunity as worldwide distributor of Tokai tags that would greatly exceed its prior sales." *ID Security Sys. I, supra*, 198 F.Supp.2d at 612-613, record citations omitted.

After an award to plaintiff, Checkpoint renewed its challenge, contending, in language reminiscent of USC's here, "that the apparent disconnect between the reality of ID Security's actual performance in 1996 and Dr. Kursh's rosy prediction of hitherto unprecedented future Tokai tag sales ... reveals that Dr. Kursh's model was speculative and unreliable, based on unsupportable assumptions, and that the court erred in admitting Dr. Kursh's testimony into evidence." *ID Security Sys. II, supra*, 249 F.Supp.2d at 691. Checkpoint also argued, as does USC here, that the projections were unrealistic given plaintiff's sales staff of five people, compared to defendant's **700**. *Id.* at 692-693.

The District Court again disagreed, holding that the expert was not limited to plaintiff's historical performance or size at the time of Checkpoint's interference because the contract would have been the catalyst "for substantial growth in plaintiff's business." *ID Security Sys. II, supra*, 249 F.Supp.2d at 692. Checkpoint's challenges went to the weight, not admissibility, of the testimony and were grounds for "vigorous cross-examination," not exclusion. *Id.* at 692-694.

Other cases also have also upheld lost profits calculated by comparing small plaintiffs with market leaders. In *Palm*, *supra*, 161 Cal.App.4th 206, lost profits were based on the top provider in the industry, even though the plaintiff's own "results were 'terrible' when viewed in the context of the overall market." *Id.* at 221-22, 227-228. In *Gold v. Ziff Comms. Co.* (2001) 322 Ill.App.3d 32, 53-54, the court upheld lost profits awarded to a small, money-losing computer business on the basis of expert testimony that projected a growth rate calculated by reference to industry heavyweights IBM, Dell, Apple, Compaq, Texas Instruments, and Hewlett-Packard. *Id.* at 44.[17]

Like the contract in the *ID Security Systems* litigation, the CTA provided Sargon with the opportunity to "greatly exceed its prior sales." Refusing to allow the jury to consider comparisons with larger companies

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[17] *Kids' Universe, supra*, 95 Cal.App.4th 870, cited repeatedly by USC, is inapposite. Unlike Sargon, the plaintiffs' website was not an established business. *Id.* at 887. More importantly, "plaintiffs presented no evidence to the effect it was reasonably probable the venture would have been profitable," no "evidence of a satisfactory basis for estimating what the probable earnings would have been," and no "method for determining lost *profits*." *Id.* at 887-888, italics in original. Instead, the expert tried to estimate plaintiffs' future "capital value" by reference to the market leader. *Ibid.* The court rejected this attempt because the expert assumed *without evidence* that plaintiff's unestablished business would have been a "roughly equal competitor[]" to the market leader. *Id. at* 887. He presented no "specific economic or financial data, market survey or analysis based on the business records or operating histories of similar enterprises," and relied on "news articles" rather than "actual data" pertaining to the market leader. *Id.* at 887-888.

guarantees that Sargon could ***never*** be made whole – even though USC itself recognized the revolutionary potential of the Implant. Such a result would be inequitable and neither is, nor should be, the law.

d. The Evidence Supported Skorheim's Conclusions Concerning The Predictors Of Market Share.

USC reserves most of its venom for Skorheim's use of innovation and studies as predictors of market share and, thus, of Sargon's lost profits. (OB 40-44.) USC initially asserts that there was no economic or scientific basis for Skorheim's premise that innovation and studies create market share. (OB 40.) This assertion ignores the record. The importance of these drivers was confirmed by Sargon's competitors, industry experts, and research from the Millennium Research Group ("MRG").[18]

The market co-leader, Nobel, stated in its annual reports that "the single most important success factor when it comes to creating growth is the continued introduction of new and innovative products," attributed Nobel's success to its "ultra-innovative products," and reported that "frequent launches of innovative products play a decisive part in the growth

[18] MRG is a market research firm that specializes in research relating to the medical and dental product markets. (4RT J24:14-19.) As Skorheim and the industry experts testified, MRG data is considered reliable and is used by damages experts and implant companies in developing their business plans. (5RT K38:5-25; 7RT 358:1-8; 8RT 686:1-8.)

of this business area." (4RT J41:7-27; 6RT 28:26-29:24; 1ART 7:6-8:24; 30AA 7742, 7745, 7747, 7751.) The other market leader, Straumann, likewise attributed its success to "innovation management," reporting for example that its 2001 introduction of a unique surface treatment resulted in its greatest market share gain. (6RT 43:6-46:13; 31AA 7808.)

Skorheim's research also confirmed the importance of his related "driver," the ability to use clinical studies from respected institutions (preferably universities) to validate the innovative product. Both Nobel and Straumann touted the studies supporting their products and attributed their success thereto. (4RT J47:14-J48:7, J52:2-J55:7; 30AA 7743; 32AA 8172, 8179-8190; 32AA 8220-8227, 8232-8233, 8236-8237.) MRG confirmed that Straumann succeeded because of the "extensive clinical data" supporting its products, that one of Astra-Tech's "primary marketing strengths" is documentation providing "evidence of the effectiveness of its [products]," and that Astra-Tech ranked with Nobel and Straumann "for documented proof of effectiveness of its system." (32AA 8152, 8156.)

The industry experts agreed. Pendry confirmed that:

- "[I]nnovation and scientific research are the two key pillars that support the implant business." (4RT J64:25-J65:2.) Clinical studies and innovation *alone* will capture significant market share. (4RT J135:20-27.)

- "[T]o market a dental implant product you must have a truly innovative concept ... and it must be backed and supported by credible, legitimate and prestigious clinical background research from some prestigious university." (4RT J72:10-23.)
- When Straumann introduced one innovation, supported by university studies, the impact was "tremendous"; when it introduced a first-of-its-kind impression system, and established its efficacy with a clinical study, Pendry's sales increased by 50%. (4RT J72:24-J78:6.)

Hanson too confirmed that innovation and clinical research create market share, based upon the success of his company, which offered products whose "enormous growth" he attributed to university studies, and of his competitors. (5RT K96:3-26, K129:18-K131:17.) Hanson confirmed that "an innovative implant product that has a successful clinical study from a prestigious university will create enormous growth in sales" and projected that Sargon would have attained a 15% to 20% market share over ten years if its Implant was supported by successful study reports. (5RT K133:23-K134:3, K137:3-K138:28.) He knew of no company with

an innovative product supported by a clinical study that ceased doing business. (5RT K133:13-22.)[19]

Conversely, the absence of study reports validating the Implant suffocated Sargon's growth. As oral surgeon Dr. Alan Kaye testified, the Implant would have captured substantial market share with the USC study results. But, once dentists had learned about the study, USC's failure to issue reports was a "red flag." (11AA 2675:21-2676:10.) Pendry agreed that USC's actions would have "a very negative impact on the attitude and thoughts of the general clinical population"; once USC damaged Sargon's ability to market its Implant, there would be "no recovering from that." (4RT J96:19-J98:15-21.)

[19] Hanson found that innovative products supported by studies performed better than products lacking such support. (5RT K90:10-K92:24, K99:23-K100:27.) When Hanson's company (Calcitek) acquired a competitor (Paragon), the sales of the two were roughly equal. After the merger, Paragon's sales outstripped Calcitek's because Paragon introduced innovative new products supported by a Veterans Administration study. (5 RT K90:10-K92:24.) The more studies Hanson had, the more notice doctors took, and sales grew. (5RT K104:9-19.)

e. The Evidence Supported Skorheim's Conclusion That The Degree Of Innovation Determines Market Share.

The performance of Skorheim's benchmark companies confirmed that the degree of technological achievement is material to a company's success. Historically, the largest market share gainers are those that showed the most dramatic innovation. (5RT K58:2-66:28.)

Nobel's innovative process, which allowed the patient to heal before the implant was placed, gained Nobel the dominant market share. (5 RT K60:10-K62:18.) Straumann's subsequent development of a process that avoided Nobel's second surgery propelled Straumann to a 22% share. (5 RT K53:6-13, K62:19-K65:17.) 3i, also recognized for innovation, was (like Straumann) basically a start-up in the late 1980s. By 2000, 3i and Straumann were the number two and three companies, with 3i attaining a 17% share in 13 years. (7RT 303:25-305:24, 316:2-317:12; 5RT K53:6-19, K62:19-K65:17.)

Lazarof corroborated the "direct correlation" between innovation and market share. (11RT 1815:15-21.) He testified that each of the market-leading companies reached its position based on its degree of innovation: Nobel was the "first-mover" in osseointegration, Straumann in the "single-stage" process. (11RT 1815:22-1818:10.) 3i's innovations included developing better-looking prosthetics and a product that worked

better for smokers. (11RT 1818:12-1820:3.) For each of the market leaders, Lazarof described its innovation and how that innovation compared with the other leaders, and explained the basis for his relative ranking of their innovations.[20] (11RT 1815:22-1823:2.)

The trial court expressly acknowledged that Lazarof's testimony provided a "factual basis" for Skorheim's "pecking order," or ranking of the comparators' relative degrees of innovation. (21AA 5344:3-4.) Yet it refused to consider that testimony because Skorheim could not "equate[] the degree of innovativeness with the degree of difference in market share." (21AA 5345:3-5.)

Instead, the trial court required Sargon to show that each incremental increase in innovativeness created a directly corresponding and equal increase in market share – *i.e.*, that a company with a 20% market share was "twice as 'innovative'" as one with a 10% share. (21AA 5343:26-5344:1.) But the law simply does not require this degree of exactitude. *See GHK Assocs. v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 874 (lost profits computation may be "an approximation").

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[20] For example, although Astra-Tech had added micro-threading for better gum healing, this development was not as innovative as other companies' advances because gum problems historically are not significant. (11RT 1822:6-1823:2.)

f. The Jury Had Sufficient Guidance To Determine Relative Degrees Of Innovation.

USC also argues that Skorheim's testimony was properly excluded because Skorheim failed to provide the jury with "rational standards" for comparing innovativeness (OB 42-44), an argument adopted by the trial court. (21AA 5346-5348.) Skorheim's four scenarios, based on different degrees of innovation, would have allowed the jury to decide how Sargon's Implant ranked in terms of innovation. (2ART 65:2-66:23.)

This is not a deficiency; it is consistent with established procedure. Juries can and do consider whether products are innovative, and how innovative they are. *E.g., Amgen, Inc. v. Hoffman-La Roche Ltd.* (D. Mass. 2008) 581 F.Supp.2d 160, 227 (jury correctly concluded that disputed process was "not innovation"); *Bowling v. Hasbrow, Inc.* (D.R.I. 2008) 582 F.Supp.2d 192, 204-205 (jury had sufficient information to set patent infringement royalty, even where rate could depend on whether product was "innovative").

Moreover, the practice of providing alternative damage calculations from which the jury may select is also well recognized. In *Bay Guardian Co. v. New Times Media LLC* (2010) 187 Cal.App.4th 438, 450-452, an expert CPA presented several lost profits scenarios ranging from $4.1 to $11.8 million, and left it to the jury to determine which alternative was justified by the facts. The jury's award of $6.4 million was affirmed.

In a case with strong procedural parallels to this one, *Fontana Pipe & Fabrication v. Ameron, Inc.* (9th Cir. May 14, 1993) 993 F.2d 882, 1993 WL 159908, the plaintiff's lost profits expert presented four scenarios, ranging from $15.5 to $41.1 million. The lower court had granted a defense verdict on the grounds that the lost profits evidence was insufficiently specific. The Ninth Circuit reversed and remanded. On remand, the lower court again granted a defense verdict. Again, the Ninth Circuit reversed and remanded for another new damages trial, finding that the lower court had imposed "an incorrect (and overly strict) standard" on plaintiff's damages evidence. It held that the two most conservative scenarios had evidentiary support and should have been presented to the jury. 1993 WL 159908 at **3-4.

See also Miller v. Cudahy Co. (D. Kan. 1984) 592 F.Supp. 976, 991-992, *aff'd in part, rev'd in part* (10th Cir. 1988) 858 F.2d 1449 (expert presented six different lost profits scenarios ranging from $1,504,869 to $11,500,620; district court awarded $3,060,000); *Brennans, Inc. v. Dickie Brennan & Co.* (5th Cir. 2004) 376 F.3d 356 (affirming lost profits award where expert presented a low estimate, a high estimate, and a weighted average, each representing different set of assumptions).

Skorheim's presentation of alternative scenarios for the jury's consideration is not only a well-recognized approach – it is the recommended one. One of USC's own cited commentators (OB 55-56)

recommends that courts be more liberal in admitting lost profits testimony when such alternative scenarios are presented:

> Juries could understand cases much better if each expert developed several alternative scenarios based on different assumptions. For example, plaintiffs often allege that the defendant's contract breach prevented the plaintiff from bringing a new product to market. **In such a situation it may be difficult to predict how large a share of the market the product would have captured but for the breach. A court should be <u>much</u> <u>more willing</u> to allow an expert to testify as to the profits lost in such a situation if the expert presents, for instance, three versions of his or her model**, one showing the lost profits under the most optimistic reasonable assumption as to market share captured, another with a pessimistic, from the expert's not unbiased viewpoint, assumption, and a third with a middle-of-the-road assumption.

Robert M. Lloyd, *Proving Lost Profits After Daubert: Five Questions Every Court Should Ask Before Admitting Expert Testimony*, 41 U. Rich. L. R. Ev. 379, 415-417 (Jan. 2007), footnotes omitted, emphasis added. Lloyd explains that another witness, such as a marketing expert, can provide the information needed to determine which of the economist's alternative scenarios is the correct one. *Id.* at 417.

This is precisely what Sargon did. While Skorheim did not opine on the relative innovativeness of Sargon's Implant, the jury would not have been not left without guidance. Four witnesses (Lazarof, Pendry, Hanson, and Kaye), all from the dental implant industry, testified that the Implant

was not merely innovative but revolutionary. (4RT J79:25-J80:6, 5RT K106:16-K108:7; 37AA 9444:13-22.)[21] In addition, Lazarof, a practicing dentist and implant specialist, could (and did) rank the innovativeness of the Implant in comparison to the market leaders. (11RT 1815:15-1823:2.)

Sargon proffered more than sufficient evidence from multiple witnesses to allow the jury to have determined whether Sargon's Implant was revolutionary, "middle-of-the-road," or not sufficiently innovative to generate sales equivalent even to the smallest of the innovators. The trial court abused its discretion in taking away the jury's right to do so.

C. The Trial Court Abused Its Discretion In Concluding Skorheim Was Not Qualified To Perform His Damage Analysis.

USC briefly attempts to defend the trial court's ruling that Skorheim was not qualified to opine on Sargon's damages because he "lack[ed] special expertise in the dental implant industry." (21AA 5349-5350.) This argument can be disposed of as quickly as it was made.

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[21] Pendry called it "the most exciting thing [he'd] heard in the implant business ever" (4RT J80:21-J81:2), echoing the pre-dispute belief of USC's Nowzari "that the implant was one of the greater things he'd ever come across and ... was probably the most exciting thing he was doing in his life" (9AA 2251:21-24) and Landesman's prediction that it would "revolutionize dentistry" (31AA 7964:22-7965:10).

As set forth in *Los Altos El Granada Investors v. City of Capitola* (2006) 139 Cal.App.4th 629, 658:

> The essential questions which must be favorably answered to qualify a witness as an expert are two: Does the witness have the background to absorb and evaluate information on the subject? Does he have access to reliable sources of information about the subject?

Skorheim easily satisfies both prongs of the test. His extensive and wide-ranging training, experience, and credentials in business and economics plainly gave him "the background to absorb and evaluate information" on the dental implant industry. He has been a CPA for 25 years. (4RT J12:8-10.) He is a business consultant, a Certified Valuation Analyst (one recognized as having expertise in analyzing businesses and their industries, and valuing those businesses, their assets, and interests) and Certified Forensic Accountant (one recognized as having expertise in analyzing financial evidence and assisting the trier of fact in understanding that evidence) who specializes in forensic accounting, business analysis, and damages. (4RT J15:26-J17:2.)

Skorheim has analyzed businesses in "high technology fast paced environments" like the dental implant industry. (8RT 747:22-24.) He has testified in more than 100 cases, many involving lost profits and/or business valuation, including cases involving technology, healthcare, and a dental

implant company specifically. (4RT J12:5-J17:24; 13AA 3238-3247; 43AA 11059:5-20.)

Skorheim also had "access to reliable sources of information" and "relevant data" on the industry. He interviewed industry executives, and reviewed litigation materials, financial information for Sargon and its competitors, independent market analyses, annual reports, and materials on the industry, implant training, and the work that universities have done with implants. (4RT J20:26-J22:24, J23:7-20, J24:14-J25:19.)

The trial court nevertheless ruled that Skorheim could not testify about the implant industry because his testimony was based on research, not experience. (21AA 5350-5351.) This is not the law. "An expert is not required to have personal experience concerning the subject matter of the expert's opinion testimony, as long as the other requirements concerning expert testimony are met." B. Jefferson, *California Evidence Benchbook* (4th ed. 2011), §30.23, p. 671. *See, e.g., Clauser/Wells Partnership, supra*, 95 Cal.App.4th at 1085 (error to exclude testimony on value of auto parts where expert had "read books, attended courses and conversed with business valuation appraisers and brokers"; expert's reliance on these sources went to weight, not admissibility).

When a trial court applies incorrect legal principles, as did the lower court here, its discretion is *a fortiori* abused. *People v. C.S.A.* (2010) 181

Cal.App.4th 773, 778. The trial court's ruling was reversible error for this reason as well.

D. Skorheim's Factual Assumptions Were Supported By The Evidence.

USC lastly argues that Skorheim relied upon a "cascading series of unfounded assumptions" that rendered his testimony "unreliable." (OB 46-50.) None of USC's five cited criticisms has any merit. Its summary of Skorheim's testimony is misleading, it ignores the evidence that supports Skorheim's conclusions, and it seeks to impose a standard of exactitude not required by law.

Working backward from only the most optimistic scenario, USC first claims that Skorheim's projections depend on very precise assumptions as to exactly how many dental schools and dentists would adopt the Implant. (OB 47-48.) But Skorheim did not base his projection on the statistics USC cites – *e.g.*, the assumption that exactly 33 schools would adopt the Implant, or that 678 USC graduates would use the Implant in at least 35% of their anticipated 100 annual procedures.

Instead, the document to which USC cites (15AA 3795-3802) was simply a back-test, prepared by Skorheim after making his market share projections to ensure that achieving even the most optimistic, 20% projection would not require an unrealistic roll-out of the Implant. (14AA

3599:8-3603:8.) It would not; the so-called assumptions in that back-test proved consistent with the data Skorheim had reviewed. (14AA 3606-3646.)[22] Moreover, a similar back-test of the most conservative, 3.75% scenario would yield far more modest "assumptions." Given these facts, the reasonableness of these "assumptions," even were they integral to Skorheim's analysis (they were not), would be for the jury to decide.

In sum, while any increase in market share of course would entail increased usage by dentists and dental schools, Skorheim's projections did not depend on Sargon achieving the specific numbers set forth in his back-test. USC's attempt to make it look as if Skorheim created from whole cloth very precise assumptions as to how many dental schools and dentists would adopt the Implant, or the exact number of Implants each dentist

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[22] For example, the so-called "assumption" that 50% of the students who received implant training would place implants in their practice was supported by an article entitled "Evaluation of a Predoctoral Implant Curriculum" taken from the N.C.B.I. website. (14AA 3612:20-3613:22.) Likewise, the "assumption" of number of implants placed per dentist was supported by an A.D.A. (American Dental Association) survey and MRG data. (14AA 3614:9-3615:4.) The "assumption" that implant dentists could be expected to use Sargon's product 35% of the time was conservative given dentists' testimony that they used Sargon's product more than 50% of the time and other information generated by Skorheim's research. (14AA 3615:12-3617:14.) Likewise, the "assumption" that other dental schools would study and adopt the Implant once USC had published the study results is supported by the testimony of the industry experts. (4RT J78:7-J79:24 [once Pendry had a "high class, prestigious university" study, other schools approached him]; 5RT K135:1-K137:2 [Hanson confirms that a successful university study stimulates other studies].)

would place per year, is both misleading, and an attempt to demand an absolute mathematical certainty that is not required. *GHK Assocs., supra*, 224 Cal.App.3d at 873.

USC next states that Skorheim assumed without evidence that Sargon would make a "seamless transition" from start-up to market leader in approximately 10 years. (OB 48.) That was the evidence. Other than Nobel, which pioneered the industry, the success of the other market leaders occurred quickly (or "seamlessly" to use USC's word), with each attaining their substantial market shares in six to thirteen years. (7RT 303:25-306:8, 317:4-322:6.)

Furthermore, other one or two-person implant companies like Sargon made just such "seamless" transitions from start-up to become, or be acquired by, market leaders. For example, Calcitek (later acquired by comparator Zimmer) was started by two scientists in their garage. Without outside capitalization, it grew to a 5% share. (7RT 429:18-430:3, 438:3-16.) Paragon, started by a practicing dentist, ultimately sold for $102 million. 3i was started by one dentist and one engineer, and grew to its number three position and 17% share. (7RT 428:18-429:1, 435:1-438:2.)[23]

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[23] In Skorheim's experience, this is characteristic of fast-paced, technology driven markets. For example, the cellular telephone market had been dominated by four or five major companies until a start-up named Qualcomm came up with a better idea and became the market leader in about seven years. (7RT 304:7-16, 319:27-320:28.)

In addition, as explained above, Skorheim gave the jury the ability to conclude that Sargon never would attain the market share of any of the innovators, and adjust its award accordingly. For example, if the jury concluded that Sargon was similar to Astra-Tech, but would not make a "seamless transition" to Astra-Tech's level and instead would "stall-out" at a 1.75% share in 2001, it could award $7,014,078 in damages. (13AA 3233.) *See Palm, supra*, 161 Cal.App.4th at 228 (jury awarded less than half expert's most "conservative [lost profits] estimate"); *Mammoth Lakes, supra*, 191 Cal.App.4th at 472 (lost profits calculation yielded value of $37 to $48 million; jury awarded $30 million).

USC next faults Skorheim for supposedly assuming that the six market leaders would not make any competitive response and instead that one or more would "just go quietly" and abandon the market. (OB 48-49, quoting the Ruling at 21AA 5356.) But neither USC nor the trial court cite evidence that Skorheim's predictions depended on one or more of the leaders abandoning the market. Skorheim simply acknowledged that, if Sargon reached his most optimistic 20% projection, its gains would come at the expense of its competitors, one or more of which would "probably fall out of the top six" and "maybe" rethink their participation in the market. (6RT 39:28-40:13.)

That the increased sales that would result from Sargon's revolutionary product being validated by the USC study would eat into the

existing leaders' market shares is both logical and supported by the history of the market. For example, Straumann's introduction of its single-stage process, along with 3i's introduction of its significant innovations reduced Nobel's market share from 40% to 23-25%. (7RT 303:3-23.)

The cases USC cites for the proposition that Skorheim was required to assume some hypothetical yet unspecified competitive response by the market leaders are inapposite. For example, in *Trademark Research Corp. v. Maxwell Online, Inc.* (2d Cir. 1993) 995 F.2d 326, 333, the expert's predictions of market expansion were not merely unsupported by the evidence, they were contradicted by the plaintiff's own evidence that the market was actually likely to decline. At most, whether Skorheim's analysis adequately accounted for competitors' hypothetical responses was grounds for cross-examination and contrary expert testimony, not wholesale exclusion. *See Bay Guardian*, *supra*, 187 Cal.App.4th at 451 (defendant's expert criticized plaintiff's expert for failing "to consider competition"; jury awarded damages towards lower end of expert's alternative scenarios).

Ironically, had Skorheim attempted to divine how each of Sargon's competitors might possibly have responded to the Implant, that itself might have rendered Skorheim's testimony impermissibly speculative. *See Flagg v. Andrew Williams Stores, Inc.* (1964) 127 Cal.App.2d 165, 174 (rejecting criticism that lost profits expert had failed to consider competition from a

restaurant the defendant had a right to open when there was no evidence that defendant intended to do so; this criticism was "itself based on pure speculation"); *Palm, supra*, 161 Cal.App.4th at 227 (that profit projection "failed to account for other reasons why [plaintiff] failed to meet its income expectations" did not require its rejection; defendant "did not offer any evidence that any particular factor would have negatively affected [expert's] estimates").

USC next repeats its criticisms of Skorheim's assumed profit margin and assumption that Sargon would have been able to double 1998 sales. (OB 49-50.) These assumptions were amply supported, as already demonstrated. For example, industry executive Pendry testified that a company at Sargon's level in 1998 could expect a "doubling and tripling effect" on sales by supporting an innovative implant with positive clinical study reports. (4RT J161:2-17; 5 RT K133:23-K134:3.) And Skorheim explained that he adjusted Sargon's anticipated profit margin by reference to industry data because Sargon's margin was artificially depressed and would have normalized as its sales grew (8 RT 612:14-617:27; 15 AA 3734:21-25), an explanation the jury should have been allowed to consider.

USC's criticisms are similar to those directed at the expert's calculation of $160 million in future profits from a never-built hotel/condominium complex in *Mammoth Lakes Land Acquisition, supra*, 191 Cal.App.4th 435. Defendant challenged the analysis as speculative on

various grounds, including because it required the trier of fact to assume: (1) all necessary permits would be obtained, (2) environmental review would be completed, (3) estimated construction costs were accurate, (4) the project would be built within the estimates, (5) the developer would successfully obtain financing, (6) the developer would successfully associate with a major brand, and (7) the mix of project units could be sold within the anticipated time frame and at projected prices. *Id.* at 473-474. The court disagreed, finding that the expert had adequately explained the bases for these assumptions and that his projection, "though predictive, was not speculative." *Id.* at 474.[24]

At bottom, USC's challenge to this supposed "cascading series" of assumptions goes to the weight of Skorheim's opinion, not its admissibility. USC's criticisms might have been properly directed to the jury, but they were not grounds for excluding the testimony in its entirety.

E. The Trial Court Erred In Not Letting The Jury Consider Lower Awards Or Alternative Calculations.

The trial court excluded all of Skorheim's testimony. (21AA 5360.) Even if some of Skorheim's four market share scenarios – or some of their

[24] USC's counsel is certainly aware of *Mammoth Lakes* as it was the firm that successfully defended that expert's projections. 191 Cal.App.4th at 440.

components – were speculative (they were not), it was still prejudicial error to exclude all of Skorheim's testimony.[25]

First, although USC attempts to disguise this with its Table 1 (OB 11), Skorheim did not present lump sum damage totals. He separately calculated 1998-2009 and post-2009 losses, and broke out 1998-2009 losses year-by-year, beginning with a loss of $573,739 in 1998. (13AA 3236.) Even if the trial court concluded that Skorheim's cumulative totals were speculative, the jury should have been permitted the opportunity to consider and award damages for some shorter period, based on a smaller assumed market share.[26]

Second, as the Court of Appeal correctly held, the jury should at least have been permitted to hear Skorheim's most conservative comparison, to Astra-Tech, because "Astra-Tech was sufficiently similar to Sargon and a damages award based on a comparison to Astra-Tech would have been supported by substantial evidence, not speculation." (Opinion

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[25] Indeed, the trial court did not permit Sargon to address USC's criticism that Skorheim's projections were not grounded in Sargon's historical sales by having Skorheim project future sales increases by applying anticipated growth rates for immediate load implants to Sargon's 1998 sales. (5RT K8:3-4, K14:18-K16:9.)

[26] For example, if the jury concluded that Sargon's advantage would last only through 2001, it could have awarded between $7,014,078 under scenario one (by which time Sargon would have attained a 1.75% share) and $24,382,454 under scenario four (a 7% share). (13AA 3233, 3236.)

30.) Given that Astra-Tech had reached 4.8% (40AA 10239), Skorheim's projection of a more conservative 3.75% share should have been allowed.

F. The Over-Aggressive Exclusion Of Expert Testimony Advocated By USC And Practiced By The Trial Court Undermines The Adversary System.

Though the Opinion is consistent with established law, USC insists that an expanded "gatekeeping" role is needed to protect unsophisticated and easily bamboozled juries from testimony they cannot understand or evaluate. (OB 54-56.) The failure to reverse, according to USC, will blackmail defendants into unfair settlements, overwhelm the courts, and stifle research and innovation. (OB 3-4.) USC is wrong.

1. There Is No Evidence Juries Are Unable Or Unwilling To Critically Evaluate Expert Testimony.

USC's effort to find support for the expanded gatekeeping role it urges in social sciences research is unavailing. The research finds no evidence juries are unduly swayed by experts. *E.g.*, Neil Vidmar & Shari S. Diamond, *Juries and Expert Evidence*, 66 Brook. L. Rev. 1121, 1140-1144, 1148 (2001) ("Vidmar") (jurors critically evaluate experts' credentials, motives, opinions); Vidmar 1153-1154 (no evidence jurors overwhelmed by lost profits testimony in price-fixing case); Joseph

Sanders, *Scientifically Complex Cases, Trial by Jury, and the Erosion of the Adversarial Process*, 48 DePaul L. Rev. 355, 364-65 (1998) ("Sanders") (juries may tend to view experts with skepticism as "hired guns").

Nor does the research suggest that jurors are unable to critically assess the *substance* of expert testimony. Michael F. Baumeister & Dorothea M. Capone, *Admissibility Standards as Politics – The Imperial Gate Closers Arrive!!!*, 33 Seton Hall L. Rev. 1025, 1041 (2003) ("Baumeister"); Vidmar 1174-1180 (studies "lend no support to the view that jury verdicts are led astray by expert testimony"); Richard A. Posner, *The Law and Economics of the Economic Expert Witness*, 13 J. Econ. Persp. 91, 95 (Spring 1999), cited at OB 56 ("Fears that jurors are dazzled by evidence involving explicit probability estimates and so give it more weight than [they should] appear to be unfounded").

USC's call for "a strong role for trial courts in excluding such testimony" (OB 56) ignores the fact that: "There is simply 'no evidence that juries are incompetent to evaluate expert testimony' or that if permitted to review all expert evidence available to both sides, that there is a greater potential for unsupported, exorbitant damage verdicts." Baumeister 1040.

The U.S. Supreme Court itself has rejected the argument that juries are incapable of evaluating such evidence. *Daubert*, *supra*, 509 U.S. at 596, the seminal "gatekeeper" case with which the trial court prefaced its ruling (21AA 5328), thus cautions:

> [R]espondent seems to us to be overly pessimistic about the capabilities of the jury and of the adversary system generally. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. .... These conventional devices, rather than wholesale exclusion ... are the appropriate safeguards where the basis of [expert] testimony meets the standards of Rule 702.

This caution is reiterated in the Notes to Rule 702 of the *Federal Rules of Evidence*:

> A review of the case law after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a "sea change over federal evidence law," and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." [Citation.]

These comments recognize that the best mechanism for evaluating expert testimony is the one we have – the adversary system. Bernadette Bollas, *The New Business Rule and the Denial of Lost Profits*, 48 Ohio St. L. J. 855, 866 (1987) ("Bollas"); Vidmar 1134; Baumeister 1037. Increased judicial activism in excluding expert testimony "seriously jeopardizes the adversary process by upsetting the balance of power between the judiciary and the jury." Baumeister 1025.

As has been demonstrated (twice) in this case alone:

> a trial judge's decision on the admissibility of expert [testimony] may effectively result in

> dismissal of a plaintiff's claims without getting to the merits. This result places trial judges in the role of 'gate-closers' as opposed to 'gate-keepers.' Baumeister 1027.

As another of USC's commentators states, aggressive exclusion of expert testimony "impinges on our constitutional notion of the right to a jury trial." Weinstein 491-492.

The "chilling" and "erosive" effect of such judicial activism (Baumeister 1042) goes beyond individual cases. "[A] judicial decision to exclude expert testimony from a jury's purview not only deprives that specific plaintiff of warranted compensation, but has the potential to discourage similarly situated individuals from seeking a judicial remedy for their actions." Baumeister 1025, footnote omitted.

USC applauds – indeed, urges – such a result, arguing that if Skorheim's testimony is permitted, there will be overflowing courtrooms, mass bankruptcies, and the end of academic research. (OB 57-59.) But Skorheim's testimony, revealed well before trial, did not force a "blackmail settlement." (OB 57.) Moreover, this litigation's length, cost, and burden result from the exclusion of expert testimony, not its admission. Had lost profits evidence been admitted in 2002, when first offered, or in 2007, after remand, the parties would not be here now.

The true harm comes from adopting USC's position. If activist trial judges refuse to let juries hear lost profits testimony, defendants will have

"an incentive to breach contracts, infringe intellectual property rights, or violate antitrust laws to crush competitors." Robert M. Lloyd, *The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means*, 12 Transactions 11, 16 (2010) ("Lloyd"); *see also* Bollas 870, 874-875 (exclusion of lost profits testimony "actually encourages breaches" by removing disincentive of damage awards).

"The purpose of requiring that the plaintiff prove its damages with reasonable certainty is to protect honest businesses from inflated claims.... If the defendant has intentionally violated the antitrust laws or intentionally infringed the plaintiff's intellectual property, it should not get the benefit of a rule intended to protect honest businesses, particularly when that benefit comes with a cost to the injured plaintiff." Lloyd 48, emphasis added.

USC, which destroyed Sargon's admittedly "revolutionary" Implant by sabotaging the clinical trial and altering records while accepting monies from Sargon's competitor (Opinion 9) is in no better position to claim the benefits of a rule that protects honest businesses. If USC's misconduct caused Sargon to lose millions of dollars, the injustice lies in depriving Sargon of its recovery, not requiring USC to pay it.

2. The Judicial System Already Protects Against "Speculative" Awards.

There is no support for USC's warnings that industry and scholarly research are threatened by out-of-control damage awards. To the contrary, existing procedures safeguard against such a result.

Some of these protections are contractual. Organizations like USC, which had far greater bargaining power than Sargon, can negotiate to prohibit consequential damages. *Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC* (2010) 185 Cal.App.4th 1050, 1064 (commercial lease prevented tenant from suing for "consequential or punitive damages or loss of profits"). They can also negotiate specific liquidated damage sums under *Civil Code* §1671. *El Centro Mall LLC v. Payless ShoeSource, Inc.* (2009) 174 Cal.App.4th 58, 65 (affirming enforcement of liquidated damage clause).

In addition to contractually-negotiated limitations, existing civil procedures protect against unsupported damage awards. Trial courts have the power to enter JNOV (*CCP* §629), grant new trials if damages are "excessive" (*CCP* §657(5)), order remititur (*CCP* §662.5), and/or stay execution while defendant readies an appeal (*CCP* §918). Enforcement of judgments which are on appeal may be stayed by an undertaking (*CCP* §917.1) or *supersedeas* (*e.g.*, *Davis v. Custom Component Switches* (1970) 13 Cal.App.3d 21, 27).

That USC distrusts these traditional protections, and failed to employ any of the contractual limitations available to it, does not justify the abdication of appellate review advocated by the dissent. Nor does it entitle a defendant to avoid fully compensating a plaintiff it indisputably has damaged. USC's palpable fear that a jury might actually hold it accountable for some or all of the harm it caused does not justify a wholesale revision of our justice system that would prevent injured plaintiffs from presenting their claims to the body to which our society confers the responsibility to evaluate those claims – the jury.

V.

CONCLUSION

In a case of history repeating itself, the "new trial" on lost profits envisioned by the Court of Appeal's 2005 ruling was prevented by another erroneous *in limine* ruling. Once again, the Court of Appeal was forced to reverse. Its Opinion doing so should be affirmed.

September 23, 2011

Respectfully submitted,

BROWNE GEORGE ROSS LLP

GLASER WEIL FINK JACOBS HOWARD AVCHEN & SHAPIRO LLP

By _____
Eric M. George

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rules 8.504(d)(1))

The text of this brief contains 13,971 words, including footnotes, as counted by the computer program used to generate this brief.

September 23, 2011

Respectfully submitted,

BROWNE GEORGE ROSS LLP

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By _____
Eric M. George

APPENDIX

Sargon v. USC
Damages Summary

	Alt # 1	Alt # 2	Alt #3	Alt # 4
First Year Market Share - Global In 1998, Sargon Enterprises, Inc. Already Captured Almost 1/2% of Global Market Share	1.00%	1.00%	1.00%	1.00%
Annual Market Share Escalator	0.250% (maximum 3.75%)	0.500% (maximum 5%)	1.000% (maximum 10%)	2.000% (maximum 20%)
Cost of Sales	20.00%	20.00%	20.00%	20.00%
Distribution Costs / R&D / Other	40.00%	40.00%	40.00%	40.00%
Other Costs	10.00%	10.00%	10.00%	10.00%
Prejudgment Interest (Simple)	7.00%	7.00%	7.00%	7.00%
Present Value Discount Rate (1998 - 2009)	15.00%	15.00%	15.00%	15.00%
Capitalization Rate	20.00%	20.00%	20.00%	20.00%
Terminal Present Value Factor (Permanent Loss of Market Share After 2009)	75.62%	75.62%	75.62%	75.62%
Interest Calculated Through (Trial Date)	7/9/2007	7/9/2007	7/9/2007	7/9/2007

Calculated Damages	Alt # 1	Alt # 2	Alt #3	Alt #4
Lost Profits (1998 - 2009)	$ 120,011,000	$ 181,020,849	$ 335,940,541	$ 640,232,628
Terminal Value (Permanent Loss of Market Share After 2009)	$ 100,473,347	$ 134,343,563	$ 269,824,425	$ 540,786,150
Total Damages	$ 220,484,347	$ 315,364,512	$ 605,764,966	$ 1,181,018,778

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Deponent: SKORHEIM
Date: 5-21-7 Pg 1 of 1

EXHIBIT A-

Sargon v. USC
Analysis of Lost Profits (1998 - 2009) and Terminal Value (Permanent Loss of Market Share After 2009)
Alternative #1

		1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	Total Lost Profits (1998 - 2009)	Terminal Value (Permanent Loss of Market Share After 2009)
Lost Revenues:															
Total Global Market Revenues		367,968,000	462,396,000	531,884,000	594,188,000	851,220,000	950,200,000	1,142,200,000	1,353,400,000	1,596,700,000	1,846,200,000	2,108,700,000	2,382,500,000	14,187,434,000	2,382,500,000
Sargon Percentage of Market		1.00%	1.25%	1.50%	1.75%	2.00%	2.25%	2.50%	2.75%	3.00%	3.25%	3.50%	3.75%		3.75%
Expected Sargon Revenues		3,679,680	5,779,950	7,975,260	10,397,905	17,024,400	21,381,750	28,555,000	37,218,500	47,901,000	60,001,500	73,804,500	89,343,750	403,063,195	89,343,750
Less: Actual Sargon Product Sales		1,767,217	1,353,023	664,808	637,488	509,274	372,125	550,632	614,576	539,602	1,000,000	1,000,000	1,000,000	10,038,745	1,000,000
Total Lost Revenue		1,912,463	4,416,927	7,290,452	9,760,419	16,515,126	21,009,625	28,004,368	36,603,924	47,361,398	59,001,500	72,804,500	88,343,750	393,024,452	88,343,750
Cost of Lost Revenues:															
Cost of Sales		382,493	883,385	1,458,090	1,952,084	3,303,025	4,201,925	5,600,874	7,320,785	9,472,280	11,800,300	14,560,900	17,888,750	78,604,891	17,868,750
Distribution Costs / R&D / Other		764,985	1,765,771	2,916,181	3,904,168	6,606,050	8,403,850	11,201,747	14,641,570	18,944,559	23,600,600	29,121,800	35,337,500	157,209,781	35,337,500
Administrative Costs		191,246	441,693	729,045	976,042	1,651,513	2,100,963	2,800,437	3,660,392	4,736,140	5,900,150	7,280,450	8,834,375	39,302,446	8,834,375
Total Costs of Lost Revenues		1,338,724	3,091,849	5,103,316	6,832,294	11,560,588	14,706,738	19,603,058	25,622,747	33,152,979	41,301,050	50,963,150	61,840,625	275,117,118	61,840,625
Lost Profits (1998 - 2009):		573,739	1,325,078	2,187,136	2,928,125	4,954,538	6,302,887	8,401,310	10,981,177	14,208,419	17,700,450	21,841,350	26,503,125	117,907,334	26,503,125
Pre-Judgment Interest On Lost Profits	7.00%	362,556	744,585	1,075,472	1,234,867	1,742,640	1,775,887	1,777,165	1,554,213	1,016,369	27,157			11,310,731	
Net Present Value Discount on Lost Profits	15.00%											(2,797,897)	(6,409,168)	(9,207,065)	
Present Value of Lost Profits		936,295	2,069,663	3,262,608	4,162,992	6,697,178	8,078,574	10,178,475	12,535,390	15,224,808	17,727,607	19,043,453	20,093,957	120,011,000	
Capitalization Rate	20.00%														20.00%
Capitalized Value of Terminal Cash Flow (Permanent Loss of Market Share After 2009)															132,516,825
Present Value Factor															75.82%
Present Terminal Value															100,473,347

Lost Profits (1998 - 2009)	$ 120,011,000
Terminal Value (Permanent Loss of Market Share After 2009)	$ 100,473,347
Total Damages	$ 220,484,347

Interest Calculation Date		7/1/1998	7/1/1999	7/1/2000	7/1/2001	7/1/2002	7/1/2003	7/1/2004	7/1/2005	7/1/2006	7/1/2007	7/1/2008	7/1/2009
Days Interest	7/9/2007	3,295	2,930	2,564	2,199	1,834	1,468	1,103	738	373	8	(358)	(723)

EXHIBIT A-

Sargon v. USC
Analysis of Lost Profits (1998 - 2009) and Terminal Value (Permanent Loss Of Market Share After 2009)
Alternative #2

		1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	Total Lost Profits (1998 - 2009)	Terminal Value (Permanent Loss of Market Share After 2009)
Lost Revenue:															
Total Global Market Revenues		367,968,000	462,396,000	531,684,000	584,168,000	651,220,000	950,300,000	1,142,200,000	1,353,400,000	1,566,700,000	1,846,200,000	2,108,700,000	2,382,500,000	14,187,434,000	2,382,500,000
Sargon Percentage of Market		1.00%	1.50%	2.00%	2.50%	3.00%	3.50%	4.00%	4.50%	5.00%	5.00%	5.00%	5.00%		5.00%
Expected Sargon Revenues		3,679,680	6,935,940	10,633,680	14,854,150	25,536,800	33,260,500	45,688,000	60,903,000	79,835,000	92,310,000	105,435,000	119,125,000	598,196,550	119,125,000
Less: Actual Sargon Product Sales		1,767,217	1,363,023	884,808	637,486	509,274	372,125	550,632	614,576	539,602	1,000,000	1,000,000	1,000,000	10,038,743	1,000,000
Total Lost Revenue		1,912,463	5,572,917	9,748,872	14,216,664	25,027,526	32,888,375	45,137,368	60,288,424	79,295,398	91,310,000	104,435,000	118,125,000	588,157,807	118,125,000
Cost of Lost Revenues:															
Cost of Sales		382,493	1,114,583	1,969,774	2,843,333	5,005,465	8,577,675	9,027,474	12,057,685	15,859,080	18,262,000	20,887,000	23,625,000	117,631,562	23,625,000
Distribution Costs / R&D / Other		764,985	2,229,167	3,979,549	5,686,666	10,010,930	13,155,350	18,054,947	24,115,370	31,718,159	36,524,000	41,774,000	47,250,000	235,263,123	47,250,000
Administrative Costs		191,246	557,292	994,887	1,421,666	2,502,733	3,288,838	4,513,737	6,028,842	7,929,540	9,131,000	10,443,500	11,812,500	58,815,781	11,812,500
Total Costs of Lost Revenues		1,338,724	3,901,042	6,964,210	9,951,665	17,519,128	23,021,863	31,596,158	42,201,897	55,506,779	63,917,000	73,104,500	82,687,500	411,710,466	82,687,500
Lost Profits:		573,739	1,671,875	2,984,662	4,264,999	7,508,398	9,866,512	13,541,210	18,086,527	23,788,619	27,393,000	31,330,500	35,437,500	176,447,341	35,437,500
Pre-Judgment Interest On Lost Profits	7.00%	362,556	939,456	1,487,038	1,796,881	2,840,828	2,779,653	2,964,430	2,559,863	1,701,701	42,028			17,156,813	
Net Present Value Discount on Lost Profits	15.00%											(4,013,465)	(8,569,740)	(12,583,205)	
Present Value of Lost Profits		936,295	2,611,331	4,452,298	6,060,660	10,148,027	12,646,165	16,405,640	20,646,390	25,490,320	27,435,028	27,317,035	26,867,760	181,020,949	
Capitalization Rate	20.00%														20.00%
Capitalized Value of Terminal Cash Flow (Permanent Loss of Market Share After 2009)															177,187,500
Present Value Factor															75.82%
Present Terminal Value															134,343,563

Lost Profits (1998 - 2009)	$ 181,020,949
Terminal Value (Permanent Loss of Market Share After 2009)	$ 134,343,563
Total Damages	$ 315,364,512

Interest Calculation Date		7/1/1998	7/1/1999	7/1/2000	7/1/2001	7/1/2002	7/1/2003	7/1/2004	7/1/2005	7/1/2006	7/1/2007	7/1/2008	7/1/2009
Days Interest	7/9/2007	3,295	2,930	2,564	2,199	1,834	1,469	1,103	738	373	8	(358)	(723)

EXHIBIT A-

Sargon v. USC
Analysis of Lost Profits (1998 - 2009) and Terminal Value (Permanent Loss Of Market Share After 2009)
Alternative #3

		1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	Total Lost Profits (1998 - 2009)	Terminal Value (Permanent Loss of Market Share After 2009)
Lost Revenue:															
Total Global Market Revenues		367,958,000	462,986,000	531,684,000	594,166,000	851,220,000	950,300,000	1,142,200,000	1,353,400,000	1,586,700,000	1,846,200,000	2,108,700,000	2,382,500,000	14,187,434,000	2,382,500,000
Sargon Percentage of Market		1.00%	2.00%	3.00%	4.00%	5.00%	6.00%	7.00%	8.00%	9.00%	10.00%	10.00%	10.00%		10.00%
Expected Sargon Revenues		3,679,580	9,247,920	15,950,520	23,766,840	42,561,000	57,018,000	79,954,000	108,272,000	143,703,000	184,620,000	210,870,000	238,250,000	1,117,892,760	238,250,000
Less: Actual Sargon Product Sale		1,767,217	1,363,023	684,808	637,486	509,274	572,125	550,832	814,576	539,602	1,000,000	1,000,000	1,000,000	10,038,743	1,000,000
Total Lost Revenue		1,912,463	7,884,897	15,265,712	23,129,154	42,051,726	56,845,875	79,403,368	107,457,424	143,163,398	183,620,000	209,870,000	237,250,000	1,107,854,017	237,250,000
Cost of Lost Revenues:															
Cost of Sales		382,493	1,576,979	3,053,142	4,625,831	8,410,345	11,329,175	15,880,674	21,531,485	28,632,680	36,724,000	41,974,000	47,450,000	221,570,804	47,450,000
Distribution Costs / R&D / Other		764,985	3,153,959	6,106,285	9,251,662	16,820,690	22,658,350	31,761,347	43,062,970	57,265,358	73,448,000	83,948,000	94,900,000	443,141,607	94,900,000
Administrative Costs		191,246	788,490	1,526,571	2,312,915	4,205,173	5,664,588	7,940,337	10,765,742	14,316,340	18,362,000	20,987,000	23,725,000	110,785,402	23,725,000
Total Costs of Lost Revenue		1,338,724	5,519,428	10,685,998	16,190,408	29,436,208	39,652,113	55,582,358	75,360,197	100,214,378	128,534,000	146,909,000	166,075,000	775,497,813	166,075,000
Lost Profits:		573,739	2,365,469	4,579,714	6,938,746	12,615,518	16,993,762	23,821,010	32,297,227	42,949,018	55,086,000	62,961,000	71,175,000	332,356,204	71,175,000
Pre-Judgment Interest On Lost Profits	7.00%	362,556	1,329,199	2,251,965	2,926,250	4,437,208	4,787,585	5,038,959	4,571,164	3,072,326	84,518			28,861,726	
Net Present Value Discount on Lost Profits	15.00%											(9,065,381)	(17,212,028)	(25,277,389)	
Present Value of Lost Profits		936,295	3,694,668	6,831,678	9,864,996	17,052,724	21,781,347	28,859,969	36,868,391	46,021,345	55,170,518	54,895,639	53,962,972	335,940,541	
Capitalization Rate	20.00%														20.00%
Capitalized Value of Terminal Cash Flw (Permanent Loss of Market Share After 2009)															355,875,000
Present Value Factor															75.82%
Present Terminal Value															269,824,425

Lost Profits (1998 - 2009)	$ 335,940,541
Terminal Value (Permanent Loss of Market Share After2009)	$ 269,824,425
Total Damages	$ 605,764,966

Interest Calculation Date		7/1/1998	7/1/1999	7/1/2000	7/1/2001	7/1/2002	7/1/2003	7/1/2004	7/1/2005	7/1/2006	7/1/2007	7/1/2008	7/1/2009	
Days Interest	7/6/2007	3,295	2,930	2,564	2,199	1,834	1,469	1,103	738	373	6	(358)	(723)	

EXHIBIT A-

Sargon v. USC
Analysis of Lost Profits (1998 - 2009) and Terminal Value (Permanent Loss of Market Share After 2009)
Alternative #4

		1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	Total Lost Profits (1998 - 2009)	Terminal Value (Permanent Loss of Market Share After 2009)
Lost Revenue:															
Total Global Market Revenues		367,968,000	462,396,000	531,684,000	594,186,000	851,220,000	950,300,000	1,142,200,000	1,253,[illegible]	1,584,700,000	1,846,200,000	2,108,700,000	2,382,[illegible]000	14,187,434,000	2,38[illegible]000
Sargon Percentage of Market		1.00%	3.00%	5.00%	7.00%	8.00%	11.00%	13.00%	1[illegible]%	17.00%	19.00%	20.00%	[illegible]%		20.00%
Expected Sargon Revenues		3,679,680	13,871,880	26,584,200	41,591,620	76,609,800	104,533,000	148,486,000	203,[illegible]000	271,639,000	350,778,000	421,740,000	476,[illegible]000	2,138,823,180	[illegible]000
Less: Actual Sargon Product Sales		1,767,217	1,363,023	684,806	637,486	509,274	372,125	550,632	6[illegible]%	539,602	1,000,000	1,000,000	[illegible],000	10,038,743	800,000
Total Lost Revenue		1,912,463	12,508,857	25,899,392	40,954,134	76,100,526	104,160,875	147,935,368	202,[illegible]	270,899,398	349,778,000	420,740,000	475,[illegible]000	2,128,784,437	47[illegible]000
Cost of Lost Revenues:															
Cost of Sales		382,493	2,501,771	5,179,878	8,190,827	15,220,105	20,832,175	29,587,074	40,[illegible]	54,179,880	69,955,600	84,148,000	95,[illegible]000	425,756,888	9[illegible]000
Distribution Costs / R&D / Other		764,985	5,003,543	10,359,757	16,381,654	30,440,210	41,664,350	59,174,147	80,[illegible]	108,359,759	139,911,200	168,296,000	190,[illegible]000	851,513,775	19[illegible]000
Administrative Costs		191,246	1,250,886	2,589,838	4,095,413	7,610,053	10,416,088	14,793,537	20,[illegible]	27,089,940	34,977,800	42,074,000	47,[illegible]000	212,878,444	4[illegible]000
Total Costs of Lost Revenues		1,338,724	8,756,200	18,129,574	28,667,894	53,270,368	72,912,613	103,554,758	141,[illegible]	189,629,579	244,844,600	294,518,000	332,[illegible]000	1,490,149,107	33[illegible]000
Lost Profits:		573,739	3,752,657	7,769,818	12,286,240	22,830,158	31,248,262	44,380,610	60,[illegible]	81,269,819	104,933,400	126,222,000	142,[illegible]000	638,635,330	14[illegible]000
Pre-Judgment Interest On Lost Profits	7.00%	362,556	2,108,685	3,820,622	5,181,427	8,029,961	8,803,449	9,388,019	8,[illegible]	5,813,575	160,594			52,263,053	
Net Present Value Discount on Lost Profits	15.00%											(16,169,152)	(34,[illegible])	(50,885,755)	
Present Value of Lost Profits		936,295	5,861,342	11,590,440	17,467,667	30,860,119	40,051,711	53,768,629	69,[illegible]	87,083,394	105,094,394	110,052,848	108,[illegible]	640,232,628	
Capitalization Rate	20.00%														20.00%
Capitalized Value of Terminal Cash Flow (Permanent Loss of Market Share After 2009)															71[illegible]000
Present Value Factor															25.82%
Present Terminal Value															54[illegible]150

Lost Profits (1998 - 2009)	$ 640,232,628
Terminal Value (Permanent Loss of Market Share After 2009)	$ 540,786,150
Total Damage	$ 1,181,018,778

Interest Calculation Date		7/1/1998	7/1/1999	7/1/2000	7/1/2001	7/1/2002	7/1/2003	7/1/2004	7/1/2005	7/1/2006	7/1/2007	7/1/2008	7/1/2009	
Days Interest	7/9/2007	3,295	2,930	2,564	2,199	1,834	1,469	1,103	738	373	8	(358)	(723)	

EXHIBIT A-

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 2121 Avenue of the Stars, Suite 2400, Los Angeles, CA 90067.

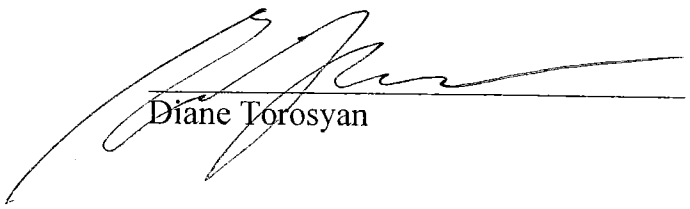
On September 23, 2011, I served true copies of the following document(s) described as **SARGON ENTERPRISES, INC.'S ANSWER BRIEF ON THE MERITS** on the interested parties in this action as follows:

SEE SERVICE LIST

BY FEDEX: I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

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

Executed on September 23, 2011, at Los Angeles, California.



Diane Torosyan

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