No. S191550
(Court of Appeal Nos. B202789 & B205034)
(Los Angeles Super. Ct. No. BC209992 (related to No. BC263701))



# IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SARGON ENTERPRISES, INC.,
*Plaintiff and Appellant,*

*v.*

UNIVERSITY OF SOUTHERN CALIFORNIA et al.,
*Defendants and Appellants.*

After A Decision By The Court Of Appeal Second Appellate District, Division One

## REPLY BRIEF ON THE MERITS

KATHLEEN M. SULLIVAN
(S.B. No. 242261)
DANIEL H. BROMBERG
(S.B. No. 242659)
QUINN EMANUEL URQUHART
& SULLIVAN LLP
555 Twin Dolphin Drive, 5th Fl.
Redwood Shores, CA 94065
Telephone: (650) 801-5000
kathleensullivan@quinnemanuel.com
danbromberg@quinnemanuel.com

JOHN B. QUINN
(S.B. No. 090378)
MICHAEL E. WILLIAMS
(S.B. No. 181299)
MICHAEL T. LIFRAK
(S.B. No. 210846)
QUINN EMANUEL URQUHART
& SULLIVAN LLP
865 S. Figueroa Street, 10th Fl.
Los Angeles, CA 90017
Telephone: (213) 443-3100
johnquinn@quinnemanuel.com
michaelwilliams@quinnemanuel.com
michaellifrak@quinnemanuel.com

*Attorneys for Defendant and Appellant University of Southern California*

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## INTRODUCTION

Sargon Enterprises, Inc. ("Sargon") nowhere contends in its answer brief that the trial court acted arbitrarily, capriciously, or beyond the bounds of reason in excluding the testimony of James Skorheim, the expert who opined that Sargon's lost profits were at least $220 million and as much as $1.2 billion. Nor could Sargon do so, for the trial court issued a carefully reasoned 33-page decision after multiple rounds of briefing and an eight-day evidentiary hearing, holding unreliable and thus inadmissible Skorheim's comparison of a tiny startup to vastly larger global market leaders based on an unprecedented "market driver" hypothesis and unfounded factual assumptions. If this was an abuse of discretion, then trial courts have no meaningful gatekeeping role over expert opinion testimony.

Sargon's only answer is to suggest that trial courts should have no such role, and that, instead, juries should enjoy exclusive responsibility to determine whether an expert's testimony on lost profits is speculative, unreliable, or otherwise defective. This extreme position has no support in the Evidence Code or the Court's

precedents. To the contrary, the Code permits expert testimony only if it meets a threshold of reliability, and the decisions of the Court recognize that trial courts are empowered to exclude expert testimony that is, as here, speculative, unreliable, and based upon unfounded assumptions. Sargon ignores these authorities, mentioning the Evidence Code only once in its statement of facts and failing to address any of the decisions of the Court discussed in the opening brief. Instead, Sargon rests its assertion of exclusive jury responsibility upon out-of-context quotations from Court of Appeal decisions. But these decisions either are distinguishable or hold only that juries may decide the weight to give expert testimony *after* it meets the Evidence Code's threshold requirements.

Sargon likewise offers no persuasive policy grounds for its position. While Sargon accuses the University of diminishing the role of juries in favor of judicial activism, such an accusation is baseless. A holding that trial courts may exclude expert opinion testimony that is speculative or unreliable shows no disrespect for juries. Expert opinion testimony that fails to meet these threshold

requirements lacks evidentiary value, and respect for juries no more requires admission of such evidence than it requires admission of other irrelevant or misleading evidence.

Far from seeking to expand the judicial gatekeeping role or undermine the jury system, the University asks the Court to apply the traditional rules embodied in the Evidence Code and the decisions of the Court. These authorities provide for a division of responsibility between juries and trial courts: courts apply threshold requirements for reliability, and juries weigh the evidence that satisfies those requirements. The trial court's exclusion of Sargon's proffered expert opinion testimony fell well within the proper discretion accorded trial courts.

## ARGUMENT

### I. SARGON FAILS TO PROVIDE AUTHORITY FOR THE VIEW THAT ONLY JURIES, NOT TRIAL COURTS, SHOULD DETERMINE THAT EXPERT TESTIMONY IS SPECULATIVE OR UNRELIABLE

The University's opening brief demonstrated (OB 19-23) that Evidence Code section 801(b) permits expert opinion testimony only if it satisfies a threshold requirement of reliability. As the Law

Revision Commission comments recognize, this section authorizes trial courts to exclude expert testimony that is based upon "irrelevant and speculative matter," including comparisons, like the one at issue here, of "matters . . . not reasonably comparable." (Cal. Law Revision Com. com., 29B pt. 3A West's Ann. Evid. Code (2009 ed.) foll. § 801, pp. 26-27.) The opening brief also cited decisions of the Court recognizing that trial courts perform a vital gatekeeping function in excluding expert testimony that is, as here, based upon conjecture, unreliable methods or evidence, and unfounded assumptions. (See, e.g., *People v. Prince* (2007) 40 Cal.4th 1179, 1225, fn. 8; see also *People v. McWhorter* (2009) 47 Cal.4th 318, 361-362 [affirming exclusion of expert testimony based upon unreliable evidence]; *People v. Richardson* (2008) 43 Cal.4th 959, 1008-1009 [affirming exclusion of expert testimony based upon multiple unsupported assumptions]; *People v. Kelly* (1976) 17 Cal.3d 24, 30 [requiring reliability of new scientific techniques to be established through evidence of general acceptance in the relevant scientific community]; *Long v. Cal-Western States Life Ins. Co.* (1955) 43 Cal.2d

871, 882 [excluding expert testimony based upon conjecture]; *Eisenmayer v. Leonardt* (1906) 148 Cal. 596, 601 [same].)

Sargon fails to discuss any of these authorities. Its answer brief makes only a single, fleeting reference to Evidence Code section 801 in its statement of facts (AB 15), and ignores entirely the Law Revision Commission's comments on that section. Sargon also omits discussion of the Court's decisions recognizing the discretion of trial courts to exclude evidence that fails to satisfy key threshold reliability requirements.

Instead, Sargon asserts that juries have exclusive responsibility over the reliability of expert opinion testimony, quoting snippets from an assortment of Court of Appeal decisions. But none of these decisions suggests that juries rather than trial courts are responsible for determining whether threshold requirements of reliability are satisfied. They simply recognize that, once these thresholds are satisfied, juries are responsible for determining the weight to be given expert testimony.

For example, in asserting that "[w]hether any particular methodology is appropriate is 'a factual question'" (AB 25), Sargon quotes from *People ex rel. Dept. of Transp. v. Clauser/Wells Partnership* (2002) 95 Cal.App.4th 1066. While this decision uses the phrase "a factual question" (*id.* at p. 1083), it does not suggest that juries are responsible for making threshold determinations about whether an expert's testimony is based on an unreliable methodology. Instead, *Clauser/Wells* first determined that the methodology employed by an expert satisfied Evidence Code section 823's threshold requirement that valuation methods be "just and equitable" (*id.* at p. 1082), and only then recognized that "whether the specific circumstances of [the defendant's] business warranted application of [the expert's] methodology was a factual question for the jury" (*id.* at p. 1083).

Another decision cited by Sargon concerning expert methodology similarly held that questions concerning the expert's method of calculation were for the jury to decide only after recognizing that there was "nothing unreliable or 'inherently improbable' in the experts' method of calculation." *Arntz*

*Contracting Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 47 Cal.App.4th 464, 490. *Arntz* nowhere assigned the threshold determination of reliability to the jury.

Sargon's other claims of authority for its assertion of exclusive jury responsibility over expert testimony are equally unfounded. For example, in asserting that it is "for the jury—not the trial court—to decide" whether Skorheim made unfounded assumptions about profit margins (AB 30), Sargon cites an unpublished federal trial court decision from Indiana, *R.I. Spiece Sales Co., Inc. v. Bank One, N.A.* (N.D. Ind. April 12, 2006) 2006 WL 978979. But that decision merely held that a jury should decide the proper year to use in determining the plaintiff's profit margin in that case. (*Id.* at p. *6.) Moreover, it also recognized that courts should determine threshold questions concerning the reliability of an expert's testimony. (*Ibid.* ["[S]peculation or testimony based on improper inferences is inadmissible"]).

Similarly, Sargon incorrectly cites *S. Jon Kreedman & Co. v. Meyers Bros. Parking-Western Corp.* (1976) 58 Cal.App.3d 173 for its

assertion that "[t]he comparability of an expert's benchmarks presents 'fact questions' for the trier of fact." (AB 35.) While that decision does use the phrase "fact questions" (*S. Jon Kreedman & Co., supra,* 58 Cal.App.3d at p. 185), it nowhere suggests that juries have exclusive authority to determine comparability, nor could it since the expert testimony in that case was presented in a "court trial" (*id.* at p. 176). Other expert comparison cases cited by Sargon likewise do not review threshold questions of reliability, but rather hold that juries may decide specific factual disputes allegedly undermining the comparisons drawn by the experts.[1]

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[1] See *Redevelopment Agency of the City of San Diego v. Attisha* (2005) 128 Cal.App.4th 357, 371 [holding that jury should decide whether to use sales in other cities to select a multiplier for goodwill]; *City of San Diego v. Rancho Penasquitos Partnership* (2003) 105 Cal.App.4th 1013, 1041-1042 [holding that jury should decide whether condemned property would have been "upzoned" for the same uses as comparison properties]; *Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 469-470 [holding that jury should decide whether to reduce accounting agency's lost profits to reflect departure of defendant who worked more hours than the average accountant]; *Syufy Enterprises v. American Multicinema, Inc.* (9th Cir. 1986) 793 F.2d 990, 1003 [holding that jury should decide whether comparison with a movie theater was undermined by the theater's illegal "split agreement"].

Finally, the treatise on lost profits cited by Sargon (AB 36, fn. 15) does not support its contention that juries should decide all questions relating to comparability. Instead, the treatise expressly recognizes that "evidence of the experience of others will be excluded . . . when plaintiff has failed to demonstrate comparability or to make all the computations necessary to adjust for noncomparability." (1 Dunn, Recovery of Damages for Lost Profits (6th ed. 2004) § 5.13, p. 447.)

In short, Sargon fails to offer any authority supporting its assertion that juries are responsible for deciding all questions concerning an expert's methodology, conclusions, or assumptions. As shown by the Evidence Code provisions and commentary and the Court's decisions that Sargon ignores, such responsibility is shared: trial courts are responsible for determining at the threshold whether expert opinions are speculative or unreliable, and juries are responsible for determining the weight given to testimony satisfying the relevant thresholds.

## II. SARGON FAILS TO SHOW THAT THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING SARGON'S PROFFERED EXPERT OPINION TESTIMONY REGARDING LOST PROFITS

Beyond (incorrectly) asserting that juries have exclusive responsibility over all questions concerning an expert's methodology, conclusions, and assumptions, Sargon offers no reason for finding that the trial court abused its discretion in excluding Skorheim's lost profits projections. As the opening brief demonstrated (OB 17-18), trial courts exercise broad discretion in determining whether expert testimony satisfies the threshold requirements for admissibility, and therefore the rulings made by the trial court in this case should be upheld "[a]bsent a manifest abuse." (*People v. Ramos* (1997) 15 Cal.4th 1133, 1175 [reviewing exclusion of expert testimony for lacking a reasonably reliable factual basis]; see also *People v. Castaneda* (2011) 51 Cal.4th 1292, 1336 [reviewing exclusion for lacking qualification to render opinion offered]; *People v. Richardson, supra,* 43 Cal.4th at p. 1008 [reviewing exclusion for not assisting the jury]; *People v. McWhorter, supra,* 47 Cal.4th at pp. 361-362 [reviewing exclusion for speculativeness or

unreasonable comparison].)[2] Sargon fails to demonstrate such an abuse or to offer any persuasive challenge to any of the multiple defects that the trial court found in Skorheim's testimony.

### A. Historical Performance

As the University's opening brief demonstrated, the trial court had ample basis for its finding Skorheim did not rely on Sargon's historical performance in projecting the market share that Sargon would achieve by 2009. (OB 30-31.) Sargon does not suggest that the trial court lacked substantial evidence for this finding, but rather concedes that its "historical sales would not have a direct impact on his market share projections." (AB 26.)

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[2] Citing a footnote in a Court of Appeal decision, Sargon asserts that a less deferential standard applies when an expert's conclusions are challenged. (AB 21, citing *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1119, fn. 9.) Sargon neglects, however, to mention that in the cited case the trial court excluded an expert's testimony because it was insufficient to satisfy an element of a tort claim—a defect not found by the trial court here—or that the decision's discussion of the standard of review was dictum because the Court of Appeal agreed that the testimony was insufficient. (See *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1116, 1119-1121.)

Sargon also fails to explain why Skorheim doubled Sargon's historical revenues in estimating the 1998 revenues that he used as a starting point for his lost profit projections. (See OB 31.) Sargon recounts evidence suggesting that individual dentists would have purchased more implants had it had a positive clinical study and, more generally, that successful studies increase sales. (AB 27-29.) But Sargon fails to quantify those impacts and, thus, fails to explain how Skorheim decided Sargon's 1998 revenues should be doubled.

Sargon complains that the trial court did not permit Skorheim to project Sargon's damages based upon historical growth rates. (AB 60, fn. 25.) But this complaint ignores the fact that the trial court explicitly afforded Sargon the opportunity to make such a projection. At the summary adjudication stage, when Sargon first unveiled Skorheim's "market driver" hypothesis in a declaration, the trial court expressed doubts about the admissibility of Skorheim's projections and recommended that Sargon offer an alternative basis for its lost profit calculation. (12 AA 3125.) Sargon, however, waited until five days into the section 402 hearings, after

the trial court had issued a tentative opinion excluding Skorheim's projections, before trying to offer projections based upon historical growth rates. (21 AA 5335, fn. 2.) The trial court did not abuse its discretion in deciding that by then it was too late for Skorheim to so fundamentally alter his methodology. (*Ibid.*) In addition, the trial court held Skorheim's historical calculations unreliable because they were based upon gross revenues, not profits, and they used projected market shares for 2002 to 2007 rather than actual shares (*ibid.*), a ruling unchallenged here or in the Court of Appeal.

### B. Comparability Of Companies

Sargon fails to show any abuse of discretion in the trial court's finding that Sargon was not reasonably comparable to the market leaders in the dental implant industry. As previously shown, it is well-settled that courts may exclude expert opinion testimony based upon unreasonable comparisons. (OB 32-34.) Here, the trial court had ample basis for finding that Sargon was not reasonably comparable to the leaders of the dental implant industry, which are dozens—and in some cases hundreds and thousands—of times larger than Sargon by all business metrics. (*Id.* at pp. 35-36.)

In addition to asserting incorrectly that comparability is always a question of fact for the jury to decide (see, *supra*, pp. 5-9), Sargon asserts that the trial court adopted an "overly rigid test of comparability" based solely on "such 'objective business measure[s]' as size budget, sales, capitalization, and employee headcounts." (AB 30-31.) Far from applying any rigid rule, however, the trial court simply found that comparing Sargon to the dental implant industry leaders was unreasonable because Skorheim failed to show that Sargon and the leaders shared *any* distinguishing characteristics other than making dental implants, and therefore that they were "not similar . . . by any relevant, objective business measure." (21 AA 5338-5339.)

Tellingly, Sargon fails to cite a single case permitting an expert to calculate lost profits by comparing a small start-up such as Sargon with global industry leaders hundreds and thousands of times larger. Sargon contends that *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892 permitted an expert to compare a small company with "industry giant Honeywell." (AB 37.) In fact, as previously pointed

out (OB 36, fn. 3), the plaintiff's expert in that case merely used Honeywell's performance to confirm the profits that he projected based upon his "experience[] in analyzing the growth potential for small businesses." (*Sanchez-Corea, supra,* 38 Cal.3d at p. 907.) Moreover, the plaintiff in *Sanchez-Corea* was directly competing with, and sometimes beating out, Honeywell for contracts in the market at issue in that case. (*Ibid.*) As a tiny niche player, Sargon was not competing in this manner with the leaders in the dental implant industry.

Sargon's reliance upon *ID Security Systems Canada, Inc. v. Checkpoint Systems, Inc.* (E.D. Pa. 2003) 249 F.Supp.2d 622 is equally misplaced. The plaintiff in that case attempted to become an alternative source for radio frequency tags by contracting with a manufacturer, Tokai, for any tags produced by Tokai that were not sold to the industry leader and several small Asian customers. (*Id.* at p. 634.) When the industry leader induced the manufacturer to terminate the contract, the plaintiff sued for tortious interference and attempted monopolization. Contrary to Sargon's suggestion that the

plaintiff's expert there predicted that the plaintiff would have sold as many tags as the industry leader (AB 38), that expert in fact projected profits based upon the plaintiff's contract with the manufacturer and, in particular, the manufacturer's production capacity and actual sales. (See *ID Securities Systems, supra,* 249 F.Supp.2d at p. 691 [noting that expert determined maximum sales based upon "the total number of tags that Tokai had the capacity to produce" and minimum sales from "the actual number of tags that Tokai reported that it had sold"].)

Sargon also seeks misplaced support from *Palm Medical Group, Inc. v. State Compensation Ins. Fund* (2008) 161 Cal.App.4th 206. As previously shown (OB 38), in *Palm Medical,* the expert compared an occupational medical clinic in Fresno to other occupational medical clinics in the same city that "had the capacity to serve a similar volume of patients." (*Palm Medical Group, supra,* 161 Cal.App.4th at pp. 227-228.) Sargon denies that the clinics were of similar size (AB 33, fn. 13), but admits that the plaintiff clinic had the capacity to serve a similar volume of patients, which shows that, in relevant

measure, the plaintiff was roughly the same size as the other clinics and not dozens, hundreds or thousands of times smaller, as Sargon was in relation to dental implant industry leaders (see OB 35-36).

*Parlour Enterprises, Inc. v. Kirin Group, Inc.* (2007) 152 Cal.App.4th 281 is clearly more analogous, contrary to Sargon's argument and the decision below. In that case, the plaintiff's expert compared a small ice cream/food business with merely three restaurants to a large national chain with three hundred restaurants. (*Id.* at p. 290.) *Parlour Enterprises* held that this comparison was unreasonable and that the trial court should have excluded the expert testimony relying upon it—even though the business and the restaurant in that case were much closer in size than are Sargon and the leaders in the dental implant industry. (*Id.* at pp. 287, 290.) *Parlour Enterprises* thus clearly refutes Sargon's claim that the comparability of businesses in expert opinions is always a question for the jury. Yet far from reconciling this decision with its contention that juries are exclusively responsible for determining comparability, Sargon simply asserts that there was an "obvious lack

of similarity" in that case (AB 32)—an observation equally applicable to Skorheim's comparison set.

### C. "Market Driver" Hypothesis

Sargon does not offer any persuasive defense of the "market driver" hypothesis upon which Skorheim's lost profits projections are based. Skorheim tried to justify comparing Sargon to companies in some ways thousands of times larger by arguing that they are all innovative, and market share in the dental implant industry is driven by innovativeness. But despite testifying for six days at the section 402 hearing, Skorheim failed to show any economic or scientific basis for this "market driver" hypothesis (OB 40-42), and Sargon's answer brief does nothing to fill this gap. While Sargon recounts the evidence upon which Skorheim relied (AB 41-46), it fails to provide any reasoned explanation "connecting the factual predicates to the ultimate conclusion." (*Dina v. People ex rel. Dept. of Transp.* (2007) 151 Cal.App.4th 1029, 1049, citation omitted; see also *General Electric Co. v. Joiner* (1997) 522 U.S. 136, 146 ["[N]othing . . . requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert."].)

Sargon points to testimony from Skorheim recounting how the dental implant industry developed and how the market leaders introduced important innovations, as well as testimony from its owner Sargon Lazarof similarly asserting that there is a correlation between the current market leaders and their degree of innovation. (AB 45-46.) But Sargon fails to explain how this information led Skorheim to conclude that innovativeness and successful clinical studies are the primary determinants of success in the market or that market share is a function of innovativeness, much less show that this conclusion is based on a reasonably reliable methodology. The trial court did not abuse its discretion in excluding lost profit calculations based upon such speculation.[3]

Citing two federal cases, *Dolphin Tours v. Pacifico Creative Service* (9th Cir. 1985) 773 F.2d 1506, and *LePage's Inc. v. 3M* (3d Cir. 2003) 324 F.3d 141, Sargon asserts that Skorheim used an established

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[3] The opinion of Steven Hanson concerning the market share Sargon would have attained (AB 43-44) does not help Sargon because, in a ruling that was not challenged, the trial court excluded Hanson's opinion because it was untimely and nothing more than a "faith-based opinion" that was "so devoid of any meaningful analysis or data as to be worthless" (21 AA 5361-5365).

methodology in calculating lost profits based upon market shares. (AB 25, fn. 6.) But the University did not challenge Skorheim's use of market shares to calculate lost profits; it challenged the "market driver" hypothesis that Skorheim used to determine market share. While the cases cited by Sargon used market share to calculate lost profits, neither determined market share based upon anything as vague and amorphous as Skorheim's hypothesis that innovativeness drives market share. To the contrary, in one case the plaintiff's expert determined market share based upon a formal survey of customers in the affected market (see *Dolphin Tours, supra,* 773 F.2d at p. 1508) and, in the other, the expert extrapolated from actual performance and growth rates as well as internal projections (see *LePage's, supra,* 324 F.3d at p. 165).

In addition to finding that Skorheim's "market driver" hypothesis lacked any reliable basis, the trial court found that Skorheim's lost profits projections based upon that hypothesis would not assist the jury because he offered no criteria for the jury to use in determining Sargon's level of comparative innovativeness.

(OB 42-44.) Far from showing that the trial court abused its discretion in reaching this conclusion, Sargon fails to explain how a jury would determine whether Sargon's innovations are "revolutionary" rather than "meaningful," "substantial," or "good."

Instead, citing several patent cases, Sargon asserts that juries can and do consider whether products are innovative and how innovative they are (AB 47), but does not explain why that means that a jury would have had any rational means for deciding in which of Skorheim's categories to place Sargon. Sargon also points out that several witnesses testified that Sargon's implant was revolutionary (AB 49-50, fn. 21), but does not explain the criteria or reasoning that these witnesses used. Similarly, Sargon notes that its owner Lazarof, ranked the innovativeness of the various market leaders (AB 50, citing 11 RT 1815:15-1823:2), but fails to identify any criteria Lazarof might have used that would enable a jury to determine the comparative innovativeness of Sargon. Finally, Sargon touts the virtues of providing alternative damage calculations (AB 47-49), but fails to explain how multiple alternatives assist the jury when an

expert fails to offer any criteria for determining which alternative to employ.

### D. Lack of Relevant Expertise

Sargon likewise has not shown any abuse of discretion in the trial court's conclusion that Skorheim was not qualified to offer his "market driver" hypothesis. As the opening brief demonstrated, the trial court found that Skorheim lacked any expertise in the dental implant industry or in the economics of innovation that would allow him to opine that innovativeness determines market share in the dental implant industry. (OB 44-46.) In response, Sargon notes that Skorheim is a business consultant, a Certified Valuation Analyst, and a Certified Forensic Accountant who has testified in more than one hundred cases. (AB 51-52.) But, as the Court recently reaffirmed, a person's qualifications as an expert are "relative to the topic about which the person is asked to make his statement" (*People v. Castaneda, supra,* 51 Cal.4th at p. 1336, citation omitted), and Sargon fails to explain how any of Skorheim's credentials qualified him to determine that market share in the dental implant industry is a function of innovativeness.

Sargon asserts that the trial court improperly found Skorheim unqualified because his opinions were based on research, not experience. (AB 52, citing 21 AA 5350-5351.) In fact, the trial court held that Skorheim's description of the research that he did in determining that innovativeness drives the dental implant industry could not make up for his lack of any expertise permitting him to make that determination. "Because he has no expertise in this industry," the trial court stated, "all Mr. Skorheim is doing is telling us what he has read in the lay press and learned from informal interviews." (21 AA 5350-5351.) Sargon does not—and cannot—demonstrate any abuse of discretion in that statement.

**E. Unsupported Factual Assumptions**

The trial court further determined that Skorheim's testimony was based upon multiple, unsupported factual assumptions. Sargon fails to show any abuse of discretion in these determinations.

*Profit Margin*—Sargon defends Skorheim's assumption that Sargon's profit margin immediately would have jumped from its historical level of 5% to the 30% margin enjoyed by the industry leaders Nobel and Straumann on the ground that Skorheim believed

that Sargon's profit margins were depressed by the high general and administrative expenses it experienced as a young company. (AB 29.) But Sargon fails to explain why Skorheim assumed that the profit margins would jump immediately in 1998, or why they would jump to the levels of industry leaders such as Nobel and Straumann.

*Adoption by Dental Schools and Dentists*—Sargon defends Skorheim's assumption that numerous dental schools and dentists would have adopted Sargon's implant had the University study been completed favorably on the ground that Skorheim was merely testing his market share projections. (AB 53.) This back-test, however, shows the numerous contingent events that would have had to occur for Sargon to achieve those projections, thereby laying bare their speculativeness.

Sargon also asserts that Skorheim's assumptions were supported by data he reviewed. (AB 54 & fn. 22.) The key assumption in the test, however, is that 33 U.S. and 55 foreign dental schools would adopt the Sargon implant and teach it to their students. The only evidence Sargon cites in support of this

assumption is testimony that a successful clinical study from the University might have stimulated interest from other schools in conducting additional studies. (*Ibid*, citing 4 RT J78-79 and 5 RT K135-37.) This evidence, however, is from the section 402 hearing, which was conducted long after Skorheim conducted his test, and therefore could not have been used by Skorheim in formulating his opinions. Moreover, no evidence suggests that dental schools would have adopted the implant and begun teaching it at all, much less in the numbers Skorheim assumes.

*Conduct of Industry Leaders*—Sargon does not dispute that Skorheim failed to factor into his market share projections any competitive response by existing market leaders. Instead, Sargon asserts incorrectly that the decisions cited by the University requiring consideration of this obvious factor are "inapposite." (AB 57-58.) To the contrary, *Trademark Research Corp. v. Maxwell Online, Inc.* (2d Cir. 1993) 995 F.2d 326, 333, expressly listed plaintiff's assumption that its "historically aggressive competitors would take no measures to counter [the plaintiff's] ascendancy" as an example

of why the plaintiff's lost profits projections "depended entirely upon speculation of a particularly dubious kind."

*Seamless Transition*—In defending Skorheim's assumption that Sargon would make a seamless transition into a market leader, Sargon wrongly asserts that other small companies made seamless transitions from start-ups to market leaders. Sargon points to Calcitek (AB 55), but Calcitek is part of Zimmer Dental, a company that is part of a much larger conglomerate, Zimmer Orthopedic, and that grew by acquiring Calcitek, Corvent, and Paragon, another small company mentioned by Sargon. (7 RT 322:10-20.) Sargon also states that 3i was started by a dentist and an engineer (AB 55), but fails to acknowledge that 3i was acquired by a billion-dollar company and achieved its market position *before* introducing the innovations that Skorheim ascribes to it (7 RT 374:25-375:22).

Thus, the trial court did not abuse its discretion in excluding Skorheim's lost profits projections in the light of the multiple, unsupported assumptions in them. Indeed, as the opening brief demonstrated, *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870

provides analogous precedent insofar as it held lost profits projections based upon similarly unsupported assumptions insufficient as a matter of law. Sargon dismisses *Kids' Universe* as inapposite based upon the inadequacies in the evidence identified by the decision. (See AB 40, fn. 17.) But the comparison in that case was if anything more appropriate than the one here: the plaintiff in that case had developed a state-of-the-art website similar to the website of market leader eToys and had secured access to the same Web portal that eToys used. (*Kids' Universe, supra,* 95 Cal.App.4th at p. 875.) Nevertheless, *Kids' Universe* held the projected lost profits based upon this comparison "rife with speculation." (*Id.* at pp. 887-888.) The trial court did not abuse its discretion here in finding it similarly speculative to compare Sargon to companies hundreds and thousands of times larger.

*Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes* (2010) 191 Cal.App.4th 435 (see AB 58-59) does not suggest a different conclusion. As Sargon points out, the defendant in that case challenged an expert's testimony because he made multiple

assumptions. (*Id.* at pp. 473-474.) The expert, however, was simply valuing a hotel project, and the court found that each of the expert's assumptions was "intentionally conservative" and based upon evidence or his "knowledge of the industry and experience in valuing hotel projects." (*Id.* at p. 474.) The same cannot be said of Skorheim's assumptions, as he lacks any significant experience in the dental implant industry, his assumptions are unsupported by evidence, and they are anything but conservative. The trial court did not abuse its discretion in finding them unfounded.

### F. Comparability With Astra Tech

As a fallback, Sargon argues that the trial court should not have excluded all of Skorheim's testimony and, in particular, should have allowed him to compare Sargon to Astra Tech, the basis for the smallest of his profit projections. (AB 59-61.) But this projection was still $220 million, a staggering amount for a startup which in its best year had a profit of just over $100,000. (21 AA 5337, fn. 4.) The comparison between Sargon and Astra Tech is as inapt as the other comparisons drawn by Sargon because Astra Tech's market share was ten times greater than Sargon's, and Astra Tech is a part of

AstraZeneca, the industry leader which has the most overall assets, nearly $20 billion, and therefore literally dwarfs Sargon. (OB 35, 39.)

Moreover, Sargon does not show any basis by which the trial court could have excluded Skorheim's other projections without excluding this one as well. All of Skorheim's scenarios are based upon his "market driver" hypothesis, which assumes that Sargon would have equaled the market share of a current industry leader within ten years, and that hypothesis is equally speculative whether used to project Sargon's lost profits at $1.2 billion or at $220 million.

Sargon also asserts that the jury should have been permitted to award damages based upon a smaller assumed market share. (AB 14, 56, 60.) Because Sargon did not raise this argument either in the trial court or the Court of Appeal, this argument has been waived. (See, e.g., *Panopulos v. Maderis* (1956) 47 Cal.2d 337, 341.)

Finally, Sargon had ample opportunity to present expert testimony projecting lost profits based upon well-established theories rather than Skorheim's speculation. Sargon could have sought millions of dollars in lost profits based upon evidence of

specific contracts that were cancelled and usage that was delayed or reduced. (See AB 8-9; OB 15.) Sargon asserts that the trial court found this evidence insufficient. In fact, the trial court granted summary adjudication on Sargon's tortious interference claims because Sargon failed to show any injury caused by the interference it alleged, not because there was no evidence that Sargon lost sales due to a breach of the contract at issue here. (12 AA 3117-3118.) Sargon did not seek damages based upon those lost sales because it preferred to rely upon Skorheim's "market driver" hypothesis and his projections of lost profits ranging from $220 million to $1.2 billion. Sargon has no ground for complaining that exclusion of these projections left it without evidence of lost profits that it made a strategic decision not to produce.

## III. SARGON FAILS TO SHOW THAT REQUIRING TRIAL COURTS TO ADMIT SPECULATIVE OR UNRELIABLE EXPERT OPINION TESTIMONY WILL NOT IMPAIR THE ADMINISTRATION OF JUSTICE

Sargon accuses the University of seeking "an *expanded* 'gatekeeping' role," "[i]ncreased judicial activism," and "wholesale revision of our judicial system." (AB 61, 63, 67, italics added.) Such

accusations are baseless: the University is simply asking the Court to affirm the traditional gatekeeping function contemplated in the Evidence Code and recognized in the decisions of the Court. It is Sargon that is seeking a radical change by asserting that all questions concerning an expert's methodology, assumptions and conclusions are for juries to decide. Sargon fails to offer any plausible policy justification for such a change in the law.

The fundamental purpose of expert opinion testimony, which Sargon ignores, is to assist jurors to understand subjects outside their ordinary experience. (See Evid. Code, § 801, subd. (a).) As this Court recently reaffirmed, this predicate is not satisfied if an expert's opinion is based on unsupported factual assumptions or speculative reasoning, and such opinions should be excluded: "'Exclusion of expert opinions that rest on guess, surmise or conjecture is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues it must decide?'" (*People v. Vang* (Oct. 31, 2011, S184212) __ Cal.4th __ [p. 8], quoting *People v. Richardson, supra,* 43

Cal.4th at p. 1008; *see also People v. Castaneda, supra,* 51 Cal.4th at p. 1336 [same].)

Sargon argues that jurors are capable of evaluating expert testimony. (AB 61-63.) But, even if that were always true, it would not follow that all expert testimony should be admitted. Quite the contrary, to enable courts to conduct trials in an orderly manner that conserves scarce judicial resources, the Evidence Code authorizes trial courts to exclude evidence that is irrelevant or cumulative even though jurors are perfectly capable of evaluating such evidence. (See Evid. Code, §§ 350, 352.) Like irrelevant or unduly cumulative evidence, an expert opinion based upon unsupported assumptions, speculation or otherwise unreliable reasoning "has no evidentiary value" (*Jennings, supra,* 114 Cal.App.4th at p. 1117), and therefore the orderly administration of justice requires that trial courts have discretion to exclude it.

In addition, contrary to Sargon's assertions, speculative or otherwise unreliable expert testimony is likely to confuse or mislead jurors rather than assist them. (See *People v. Vang, supra,* __ Cal.4th

__ [p. 16]; *id.* at [pp. 3-4] (conc. opn. of Werdegar, J.).) Parties can "shop" around for an expert willing to give them the testimony that they want, especially regarding lost profit projections, which are easy to manipulate. (OB 56.) In addition, by definition, expert testimony concerns matters that are "beyond common experience" (Evid. Code, § 801, subd. (a)), and therefore it can be difficult for jurors to evaluate, a problem that is especially acute with lost profits projections because they involve complex calculations (OB 55-56).

Sargon asserts that "social sciences research" has not shown that "juries are unduly swayed by experts" or that they are unable to critically evaluate the substance of expert testimony. (AB 61-62.) But none of the articles cited by Sargon denies that jurors have difficulty in evaluating testimony involving complex calculations: to the contrary, the primary article cited by Sargon, which deals with expert testimony in general, acknowledges that jurors have difficulty with probabilistic and statistical evidence. (Vidmar & Diamond, *Juries and Expert Evidence* (2001) 66 Brooklyn L. Rev. 1121, 1153, 1166.) Moreover, a widely cited study in a peer-reviewed journal

focusing specifically on expert testimony concerning damages found that "many jurors wholeheartedly accepted the figures proffered by the expert for the plaintiff" and that "expert testimony influenced awards in an upward direction." (Raitz et al., *Determining Damages: The Influence of Expert Testimony on Jurors' Decision Making* (1990) 14 Law & Hum. Behav. 385, 390, 392.) Sargon and the law review articles cited by it inexplicably fail to consider this study.

Quoting the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmeuticals, Inc.* (1993) 509 U.S. 579, Sargon asserts that "[v]igorous 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." (AB 63, quoting *Daubert, supra,* 509 U.S. at p. 596.) But *Daubert* is hardly helpful to Sargon, for it "firmly rejects the notion that merely qualifying an expert paves the way for whatever he might want to contribute to the case." (1 Mueller & Kirkpatrick, *Federal Evidence* (3d ed. 2007) § 7:10, at pp. 822-823.) Instead, *Daubert* recognizes that "[e]xpert evidence can be . . . quite misleading

because of the difficulty in evaluating it" and that trial courts have a substantial "gatekeeping role" that includes "the task of ensuring that an expert's testimony . . . rests on a reliable foundation." (*Daubert, supra,* 509 U.S. at pp. 595, 597.) In fact, as previously pointed out (OB 56), under *Daubert* federal courts frequently exclude testimony by financial experts. (See PriceWaterhouseCoopers, Daubert *Challenges to Financial Experts: A Ten-Year Study of Trends and Outcomes 2000-2009* at pp. 6-7 [noting that 45% of motions to exclude financial experts are granted in whole or in part].)

Sargon also argues that contractual limitations such as waivers of liquidated damages and consequential damages can protect defendants from excessive damage awards, as can post-trial remedies and appeals. (AB 66-67.) But these options are no substitute for the gatekeeping role of trial courts in the admission of expert opinion testimony on lost profits. Liquidated damages provisions are not always enforceable (see Civ. Code, § 1671), and consequential damages waivers are not and cannot be included in all contracts. Post-trial remedies and appeals also provide only limited

protection. Contrary to Sargon's suggestion, a trial court "cannot grant judgment notwithstanding the verdict merely upon the ground that damages were excessive" (*Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 919), and the standard for ordering remittitur or granting new trials on grounds of excessive damages is demanding (dee Code Civ. Proc., § 657 [new trial permitted only if the "jury clearly should have reached a different verdict or decision"]). Finally, post-trial remedies are, by definition, available only after parties (and the courts) have endured the burden and expense of trial and the entry of a huge verdict and, thus, offer little solace to defendants pressured into settling by the threat of an excessive verdict.

Sargon points out that the University did not submit to such a "blackmail settlement." (AB 64.) It hardly follows, however, that the threat of excessive verdicts will not force many other defendants into unfavorable settlements. To the contrary, this phenomenon has been recognized by courts and commentators as well as *amici*. (See OB 57; see also *AT&T Mobility LLC v. Concepcion* (2011) 131 S. Ct.

1740, 1752 ["Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."].)

Sargon asserts that recognizing a strong gatekeeping role for trial courts would deter injured parties from seeking compensation and encourage parties to breach their contracts, infringe intellectual property rights, and violate antitrust laws. (AB 64-65.) Such predictions are baseless. As shown above, Sargon could have sought millions in lost profits based upon canceled contracts and reduced purchases. (See, *supra*, p. 30.)[4]

Finally, exclusion of speculative and unreliable expert testimony is part of, not inconsistent with, our adversary system. Juries play a key role in that system, determining the weight to be given to expert testimony and determining the facts. (Evid. Code, § 312.) Trial courts, however, play a role as well. They make the threshold determinations whether evidence is admissible (*id.*, § 310,

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[4] Sargon accuses the University of accepting bribes and engaging in sabotage. (AB 7, 29, 65.) In addition to being baseless (see 3 RT G106:24-28 [excluding the bribery accusation because it "just doesn't make sense" in light of the $10-15 million Sargon promised to donate]; 2 RA 234:21-235:16 [explaining why entries on patient charts often are not made immediately]), these accusations are irrelevant to the issues before the Court.

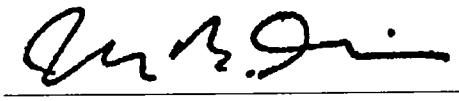
subd. (a)) and, in so doing, apply rules recognizing that certain types of evidence pose special dangers of misunderstanding or misapplication (*id.*, §§ 1100-1160). They also have general authority to determine that the danger of prejudice or confusion outweighs the probative value of evidence. (*Id.*, § 352.) Excluding expert opinion testimony that is speculative or otherwise unreliable is an essential aspect of the adversary system, especially in the context of lost profits projections, in order to avoid juror confusion and manipulation. (See, *supra*, pp. 32-34.)

Accordingly, the Court should decline Sargon's invitation to leave the rejection of speculative or unreliable expert opinion testimony exclusively to juries, and should reaffirm that the Evidence Code gives trial courts a meaningful gatekeeping function that permits them to make threshold determinations excluding such evidence.

## CONCLUSION

The judgment of the Court of Appeal should be reversed and the trial court's judgment reinstated.

DATED: November 16, 2011 Respectfully submitted,




Kathleen M. Sullivan
(S.B. No. 242261)
Daniel H. Bromberg
(S.B. No. 242659)
QUINN EMANUEL URQUHART
& SULLIVAN LLP
555 Twin Dolphin Drive, 5th Fl.
Redwood Shores, CA 94106
Telephone (650) 801-5000
Facsimile (650) 801-5100

John B. Quinn
(S.B. No. 090378)
Michael E. Williams
(S.B. No. 181299)
Michael T. Lifrak
(S.B. No. 210846)
QUINN EMANUEL URQUHART
& SULLIVAN LLP
865 S. Figueroa Street, 10th Fl.
Los Angeles, CA 90017
Telephone (213) 443-3000
Facsimile (213) 443-3100

*Attorneys for Defendant and Appellant University of Southern California*

## CERTIFICATE OF COMPLIANCE

**(Cal. Rules of Court, rule 8.520)**

Pursuant to California Rule of Court 8.520, the foregoing Reply Brief On The Merits is double spaced and printed in proportionally spaced 13-point Palatino Linotype typeface. It is 39 pages long and contains 6,906 words (excluding the tables, the signature block, this certificate, and the proof of service). In preparing this certificate, I relied upon the word count generated by Microsoft Word 2003.

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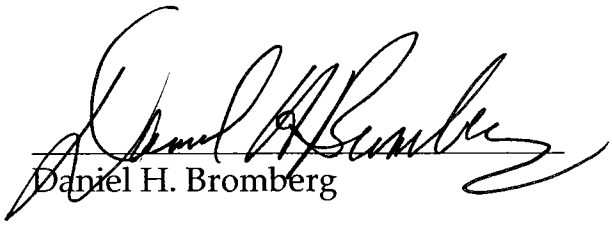

Daniel H. Bromberg

## PROOF OF SERVICE

I am employed in the County of San Mateo, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 555 Twin Dolphin Drive, 5th Floor, Redwood Shores, California 94065-2139.

On November 16, 2011, I served true copies of the foregoing document described as **REPLY BRIEF ON THE MERITS** on the interested parties in this action as follows:

Allan Browne
Eric George
BROWNE WOODS GEORGE LLP
2121 Avenue of the Stars, 24th Floor
Los Angeles, CA 90067
*Attorneys for Plaintiff and Appellant Sargon Enterprises, Inc.*

Curtis Cole
Cassidy Elizabeth Cole
COLE PEDROZA, LLP
200 S. Los Robles Avenue
Suite 300
Pasadena, CA 91101
*Attorneys for Amici Curiae California Medical Association, California Hospital Association, and California Dental Association*

Clerk of Court
Los Angeles Superior Court
Room 2004
111 North Hill Street
Los Angeles, CA 90012

Clerk of Court
California Court of Appeal
Second District, Division One
Ronald Reagan State Building
300 South Spring Street, 2nd Floor
Los Angeles, CA 90013

**BY U.S. EXPRESS MAIL:** I am readily familiar with the practices of Quinn Emanuel Urquhart & Sullivan, LLP for collecting and processing correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the United States Postal Service that same day in the ordinary course of business. I enclosed the foregoing in sealed Express Mail envelopes addressed as shown above, and such envelopes were placed for collection and mailing with postage thereon fully prepaid at Redwood Shores, California, on that same day following ordinary business practices.

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

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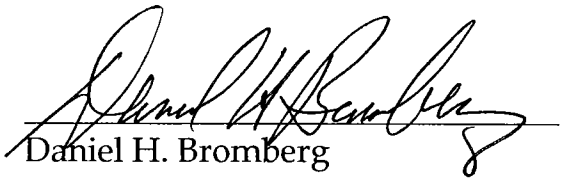

Daniel H. Bromberg