2d Civil Nos. B167519
(consolidated with B169619)

IN THE COURT OF APPEAL

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SARGON ENTERPRISES, INC.,

Plaintiffs and Appellant,

v.

UNIVERSITY OF SOUTHERN CALIFORNIA; WINSTON W.L. CHEE, B.D.S.; TERRY DONOVAN, D.D.S., WILLIAM BECKER, D.D.S., and MARK HANDELSMAN, D.D.S,

Defendants and Respondents.

Appeal from the Los Angeles County Superior Court
The Honorable Marvin M. Lager
Los Angeles Court Case No. BC209992

APPELLANT'S OPENING BRIEF

GREINES, MARTIN, STEIN & RICHLAND LLP
Timothy T. Coates (SBN 110364)
Jens B. Koepke (SBN 149912)
5700 Wilshire Boulevard, Suite 375
Los Angeles, California 90036
(310) 859-7811

Attorneys for Plaintiff and Appellant
SARGON ENTERPRISES, INC.

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INTRODUCTION

This case arose because defendant and respondent University of Southern California ("USC") breached a clinical trial agreement for a revolutionary dental implant developed by plaintiff and appellant Sargon Enterprises, Inc. ("Sargon") by conducting the clinical study improperly and failing to timely provide Sargon the required 1-year interim reports. A unanimous jury awarded Sargon almost $500,000 in damages. Sargon does not appeal that award.

But that resounding victory was rendered hollow by the trial court's flatly unsupportable pre-trial and post-trial rulings:

- Prior to trial the court granted USC's motion in limine to exclude all evidence of Sargon's lost profits despite the fact that (a) everyone understood that Sargon would make commercial use of the study reports which could result in substantial profits and (b) USC was virtually a joint venturer in the promotion of this innovative implant.
- The trial court refused to grant Sargon leave to amend to assert newly discovered tort claims that USC had altered study patient records and, coincidentally during the time it had "bungled" the study, had accepted a $300,000 contribution from one of Sargon's competitors. It did so despite the fact that there was no firm trial date—trial did not even occur until 16 months after Sargon sought leave to amend—and any purported delay in asserting the new claims was relatively short and the result of ongoing settlement negotiations.

- To add insult to injury, even though Sargon had prevailed on its contract claim and on USC's cross-complaint at trial, the trial court nevertheless found USC, not Sargon, the prevailing party for attorneys' fees under the contract and awarded USC $700,000, essentially nullifying the jury award.
- Finally, the trial court improperly slashed Sargon's costs by more than half, bringing them just $1,800 below USC's section 998 offer, and allowing the court to shift $51,000 of USC's costs onto Sargon.

This Court must reverse these incongruous rulings with directions to allow a jury to hear Sargon's lost profits evidence and all its claims, and to award Sargon the attorneys' fees and costs to which it is entitled.

The trial court refused to allow the jury to hear Sargon's lost profits claim because it found those damages not reasonably foreseeable. This despite the fact that USC was fully aware of Sargon's marketing and sales efforts, took an active role in the marketing of the implant, sponsored an International USC Symposium in Monte Carlo solely to extol the great success of the study results and the implant, and planned on using some $10-15 million of the expected profits from the implant sales to establish a new USC Sargon Implant Institute. USC even contractually agreed that Sargon could make commercial use of the study's interim 1-year reports—that commercial use's only aim was to generate profits for Sargon. Indeed, USC went so far as to assure Sargon that it would be responsible for lost profits if its choice of Dr. Winston Chee as principal investigator—about whom Sargon had serious concerns—compromised the study. The clinical trial agreement plainly acknowledged the intended commercial use of the study results.

And it was not only Sargon that expected profits as a result of this study, USC did too. The dean of the USC Dental School described the Sargon Implant as one of the major breakthroughs on the horizon of dentistry, and envisioned that USC's close association with the study and the promotion of the implant would allow the dental school to regain the international prestige it had a generation ago. USC also expected and realized more tangible profits, such as the new USC Sargon Implant Institute, and increased donations and training session fees. Yet, in the face of all this evidence, the trial court nevertheless found no jury could ever find lost profits reasonably foreseeable.

The trial court's knee-jerk refusal to allow Sargon to amend to assert serious tort claims is similarly unsupportable. The sole basis of the court's ruling was that Sargon purportedly engaged in "gamesmanship" and improperly delayed asserting the claims until the eleventh hour, thus prejudicing USC. However, Sargon filed its motion to amend less than two months after discovering that its competitor had contributed $300,000 to USC during the clinical study and some ten months after expert confirmation of USC's alteration of study patient records—but much of those ten months was taken up by delicate settlement negotiations. More critically, at the time the motion was filed, the case did not have a firm trial date and, in fact, did not proceed to trial until *sixteen months* later. Where there is no pending trial date and reasonable, excusable delay, it is not surprising that California courts have held that trial courts abuse their discretion in refusing to grant leave to amend.

The trial court's ruling on attorneys' fees is even harder to comprehend. After a 10-day trial a unanimous jury found USC had breached the contract, that USC should recover nothing on its cross-complaint, and awarded Sargon over $430,000—an unqualified win. Yet,

in an analytical Houdini act, the trial court redefined Sargon's litigation objective as solely the recovery of lost profits damages, and since it had stripped those damages from Sargon's claim, ruled that Sargon's unqualified win at trial was actually a loss. But the trial court went further. Instead of determining that there was no prevailing party, it found that USC—which had lost on all counts at trial—was the prevailing party. No reading of Civil Code section 1717 law can support this startling result.

The trial court's reduction of Sargon's costs to just $1,800 below USC's section 998 offer—and the resulting shifting of USC's costs onto Sargon—was improper because the costs struck were reasonable and Code of Civil Procedure section 1032 prohibits the apportionment employed by the trial court.

STATEMENT OF FACTS

A. Dr. Sargon Lazarof Invents A New Dental Implant That Receives 14 Patents And Marketing Approval From The FDA.

After tinkering with different prototypes starting in the late 1980s, Dr. Sargon Lazarof ("Dr. Lazarof") invented a radically new dental implant. (I RT 18:16-22:13; 24:11-25:22.)[1] The implant received the first two of some 14 patents on April 2, 1991 and February 11, 1992. (I AA 99-114.) The genius of the Sargon Implant was that it could be immediately loaded.

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[1] Citations to the reporter's transcript and the appellant's appendix start with a Roman numeral for the volume number.

With traditional implants, a patient would have to wait four to six months after an implant was installed before any crown could be mounted on the implant to fill the gap in the teeth. (I RT 11:8-15:11.) If an existing tooth had to be removed first, the waiting period would be even longer. (I RT 13:7-14:6.) During that time patients would have to avoid using that part of their mouth. (I RT 15:12-26.) The Sargon Implant, however, could be installed at the same time a decayed tooth was removed. (I RT 27:1-28:13.) And the Sargon Implant could be immediately loaded with a crown—that is, the patient could immediately begin to use the new implant/tooth. (*Ibid.*)

Dr. Lazarof began to place the Sargon Implants in his own dental practice starting in late 1990, and by 1992 had installed a few hundred. (I RT 25:20-22; 30:5-16.) Buoyed by his success with the implants, Dr. Lazarof went to his alma mater, USC, in mid-1992 to see whether it would use the Sargon Implant in the dental school. (I RT 30:26-31:23.) USC demurred, not wanting to proceed without approval of the Sargon Implant by the Federal Drug Administration ("FDA"). (*Ibid.*)

Around this time Dr. Lazarof founded Sargon to develop, market and sell the Sargon Implant. (I RT 8:19-27.) After providing the FDA with a variety of documents and data, Sargon received a 510K clearance in mid-1994. (I RT 37:2-38:22.) Thereafter, in early 1995 Sargon began to train many dentists in using the Sargon Implant, entered its first major distribution deal in Saudi Arabia, and sales of the implant steadily increased. (I RT 40:1-41:2; 45:17-46:23.)

B. USC Approaches Sargon With Interest In The Implant.

After hearing about the Sargon Implant, USC professor Marwan Abou Rass contacted Sargon in late 1994 or early 1995 with great interest in the implant. (I RT 48:18-28; 260:11-24.) Dr. Abou Rass came to Sargon's offices and observed a surgery. (I RT 49:17-50:3; 260:11-24.) Dr. Abou Rass then completed Sargon's required training and began using the implant in his patients. (I RT 54:16-55:15; 261:26-262:21.) Impressed with the results he was seeing, Dr. Abou Rass passed on glowing reports to the dean of the USC Dental School, Howard Landesman. (I RT 56:7-12; 264:23-266:10.)

C. USC Proposes A Clinical Study.

USC initiated a meeting in early 1996 with Sargon: Dean Landesman and Dr. Abou Rass represented USC, and Dr. Lazarof and Dr. Robert Garfield spoke for Sargon. (I RT 56:13-57:6.) After the meeting, Dean Landesman visited Sargon's offices, observed implants being used and came away impressed. (II RT 391:14-28.)

At these initial meetings, Sargon stressed that its goal was that USC would teach and use the implant at the dental school. (I RT 60:19-23; 61:11-15; II RT 393:20-394:1.) Dean Landesman insisted that to use the Sargon Implant at the school, USC would first have to conduct a clinical study—paid for by Sargon—to give USC academic cover to use the implant. (II RT 394:13-395:13; 396:16-397:5.) But Dean Landesman assured Sargon, "Give me one year" and "I will give you the world." (I RT 59:5; 60:3-7; see also II RT 398:7-11; 401:7-402:1.) That 1-year period

was based on scientific consensus that if an implant had not failed after being loaded for six months to a year, it was considered a success. (I RT 243:18-244:4; 270:10-16; III RT 778:6-17.) That 1-year period also became a critical component of the eventual clinical trial study agreement.

D. During The Negotiations Regarding The Clinical Study, USC Becomes Specifically Aware Of Sargon's Ongoing Marketing Efforts And Sales, And Learns Of The Importance To Those Efforts Of The 1-Year Reports.

The negotiations over the clinical trial study agreement dragged on for most of 1996. During those negotiations—which included several face-to-face meetings between Sargon and USC representatives—Sargon told Dean Landesman and Dr. Abou Rass of the specific ongoing sales and marketing efforts of the Sargon Implant in Saudi Arabia, Japan and Korea. (I RT 144:7-145:17; 202:19-203:8; 206:20-28; 207:1-209:26; 213:22–214:18; 263:10-22.) And Sargon stressed to USC the importance of the interim 1-year reports from the clinical study to Sargon's ongoing marketing and sales efforts. (I RT 76:8-81:5; 146:3-147:4; 209:27-211:20; 214:19-26; 242:17-244:13; 269:22-270:20.) Indeed, one of the USC investigators, Dr. Hessam Nowzari, told Sargon that once the 1-year reports were in hand, he would directly assist with marketing the implant in Europe, where he was educated. (I RT 84:28-85:17.)

In one of these many conversations, in August 1996, Dr. Lazarof expressed concern about USC's recent decision to appoint Dr. Winston Chee as the study's principal investigator because of past personal dislike between Drs. Lazarof and Chee. (III RT 701:28-702:8; 829:7-830:2;

830:28-831:4.) Sargon preferred that Dr. Abou Rass be the principal investigator because he had experience with the Sargon Implant and was not as wedded to the competing Branemark implant that USC was currently using (as Dr. Chee was). (III RT 702:3-12; 829:19-830:10.) In that conversation Dean Landesman and Dr. Abou Rass "said that they expected that the profits would be huge, if the study turned out as it was expected to turn out, and USC was behind the implant, as they were." (III RT 701:20-23.) Dr. Lazarof told them that he was concerned that Chee's possible enmity or lack of objectivity could imperil the study and the resulting profits and asked if USC would be responsible. (III RT 702:11-21; 830:3-22.) Dean Landesman responded: "Yes, we are. You have nothing to worry about. I will personally oversee the study. I am dean of this school. Dr. Chee takes orders from me. Dr. Abou-Rass and I both will supervise Dr. Chee very closely, and see that he stays totally in line with the guidelines of the study." (III RT 702:23-28; see also III RT 718:20-719:14.)[2]

Unfortunately, Dean Landesman left his post at USC at the end of 1998 and Dr. Abou-Rass was working in Saudi Arabia for USC during most of the study—as a result Dr. Chee was not closely supervised and had complete control over the study. (III RT 647:22-648:14; 750:8-11; 753:12-17.)

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[2] The trial court refused to consider this testimony (II AA 356-357); Sargon maintains this exclusion was improper. (See *infra* § I.C.3.)

E. USC Gets Involved In Marketing Decisions Concerning The Sargon Implant And Wants To Be Closely Involved In Any Wider Product Roll-Out.

USC was not only aware of Sargon's sales and marketing efforts, it was actively involved in them, even before the written agreement was finalized. Sargon had organized a symposium in Los Angeles in mid-1996 to discuss and promote the implant. (I RT 73:10-74:17.) Dean Landesman and Dr. Abou Rass pressured Sargon to cancel the symposium at the last minute, and instead to wait until after the 1-year reports from the study were released, when USC could put the full force of its muscle behind a symposium. (I RT 74:18-26; 265:19-27.) Sargon complied, incurring substantial costs in lost reservation fees, etc. (I RT 74:27-75:9.)

Indeed, Dean Landesman said he wanted USC to be actively involved in the marketing of the implant—he wanted the implant to be associated exclusively with USC. (II RT 406:2-407:16; 432:23-433:16; 434:25-435:6.) Accordingly, USC sought to have Sargon terminate its employment of Dr. Garfield and Dr. Marty Robbins—because they were associated with UCLA not USC—but Sargon refused to do this. (III RT 819:23-820:21.) Further, even before the agreement was signed, Dean Landesman appointed Drs. Sumiya Hobo and Young Hwan Jo, Japanese and Korean dentists promoting the Sargon Implant in Asia, as USC visiting professors. (II RT 412:23-413:15.) USC also appointed Dr. Lazarof as a clinical professor and Dr. Garfield an associate clinical professor. (II RT 414:4-416:2; see also I AA 9.)

USC's desire to be closely affiliated with the marketing of the Sargon Implant continued after the clinical trial study began. USC

sponsored Sargon training courses, awarding USC certificates to the attendees. (I RT 105:10-106:15; III RT 814:10-817:16.) USC also came up with and organized the "First International USC Symposium" in Monte Carlo on April 24-25, 1998, where the successful results of the trial study were presented by the investigators. (I RT 126:5-131:27; I AA 8-9.) Although it was a USC symposium, USC insisted that Sargon pay for it, with costs amounting to some $172,000.00, including first-class airfare and ocean-facing hotel suites for USC representatives and their families on the French Riviera. (I RT 131:10-132:28; VI RT 1308:8-1309:6.) Sargon's expert testified that it is unusual for a university to present a symposium that is paid for by a study sponsor. (II RT 474:12-476:6.)

F. USC Anticipates A Great Boost To Its Reputation And Financial Rewards Through Its Association With The Sargon Implant.

At several symposia and conferences Dean Landesman described the Sargon Implant as revolutionary and one of the major breakthroughs on the horizon of dentistry. (II RT 421:26-424:14.) Dean Landesman envisioned that the Sargon Implant could put USC back on the world map as the leading dental institution it was known as in the 1950s. (I RT 58:11-13; II RT 401:17-402:1.) Landesman and Dr. Abou Rass believed the Sargon Implant would make USC the new Gothenberg—a Swedish university associated with the Branemark implant system and the current world leader in implantology research. (I RT 18:3-14; 265:3-12; II RT 401:17-402:1; 421:26-422:24; 423:1-424:14.)

Indeed, the USC investigators expressly acknowledged that the study provided great benefits to both parties. In a memorandum from the investigators to Dean Landesman regarding the USC Monte Carlo Symposium they said, "We think that Sargon will benefit immensely from this program financially from sales of his implant and his reputation by association with USC. USC will benefit by reputation for introducing a new realm of implant dentistry and possibly financially but only from the program itself." (I AA 6.)

Direct financial benefits accrued to USC, as well. A few months before the agreement was executed, USC asked for and received a $100,000 donation from Sargon to the dental program. (I RT 224:13-225:14.) In addition, USC made some $30,000 to $40,000 in fees associated with the Sargon Implant trainings around the world. (I RT 105:10-106:15; III RT 816:6-9.)

And Dean Landesman and Sargon discussed the construction of a new Sargon Implant Institute at USC, going so far as to look at possible building sites. The institute would be largely funded by a $10-15 million donation from Sargon, which was to come directly from profits of the sale of the "USC Implant." (I RT 215:13-221:13.)

G. The Parties Execute A Clinical Trial Agreement On November 6, 1996.

After months of negotiations, the parties executed the final clinical trial agreement on November 6, 1996 (the "Agreement"), which both Dean Landesman and Dr. Chee signed on USC's behalf. The Agreement contains

no provision exculpating any party for lost profits damages or allocating the responsibility in any way.

The Agreement provides that the parties agree that the clinical trial "is of mutual interest and benefit to the University and the Sponsor." (I AA 86.) The Agreement describes USC as "a recognized leader in the fields of dental education, research, and treatment, with expertise in the clinical testing and evaluation of dental . . . technologies." (*Ibid.*)

Although the Agreement makes no specific mention of lost profits, it does reference commercial exploitation of the study results, specifying in Appendix F that "the results may be used in connection with application for registration of the implant procedure internationally." (I AA 147.) Moreover, the research protocol under which the study was performed, which was Appendix B to the Agreement, explicitly provides that data or results may be released after the 1-year interim reports are published. (I AA 129.) Thus, after one year, Sargon could use the results from the 1-year interim reports so long as it did not misuse USC's trademark or trade name. (I AA 89, 131; I RT 87:13-88:1.)

The Agreement included disclaimers by USC of any warranties regarding the results or outcome of the study or concerning the commercial exploitability of the results. (I AA 94.) The disclaimer provision said nothing about damages resulting from failure to perform the study correctly.

H. USC Touts The Success Of The Study At Professional Meetings, On Its Website And In Letters.

USC installed the first implant in the study in February 1997. (I RT 100:25-101:1.) About a year later, in March 1998, both Dean Landesman,

and Dr. Chee wrote glowing letters about the high success rate of the Sargon Implant. (I AA 4-5.) At the USC Monte Carlo Symposium in April 1998, all the participants—including Dean Landesman, and Drs. Chee and Nowzari (co-principal investigators)—extolled the great success of the Sargon Implant in the study. (VI RT 1310:11-28.) Indeed, USC's website described the great successes of the study even before the results were publicly released in Monte Carlo. (I AA 2.)

USC went so far as to terminate its exclusive use of the competing Branemark implant and began to use the Sargon Implant in certain classes and campus clinics outside of the study. (III RT 728:26-729:3; 730:5-26; 733:7-13; see also I AA 3.) Indeed, Dr. Nowzari wrote in a letter that the study results "confirme[d] the superiority of Sargon Dental Implant to our present system (Branemark System). . . . I have made the decision to introduce the [Sargon] system as the system of choice for patient care at the USC School of Dentistry, Department of Periodontology." (I AA 3.) These direct sales of the Sargon Implant totaled over $100,000, but had the study not been botched and the Sargon Implant was fully implemented as the "system of choice" for the entire dental school, the profits to Sargon would have been substantial. (III RT 730:9-26; VI RT 1306:22-28; 1503:2-21.)

I. USC Fails To Conduct The Study Properly And Fails To Timely Deliver 1-Year Reports.

But USC failed to follow through on its obligations under the Agreement. Even after repeated requests from Sargon and the intervention of Dean Landesman and his replacement, Dean Gerald Vale, USC's investigators did not produce the 1-year interim report until January 25,

1999—almost two years since the beginning of the study. (I RT 115:17-118:4; 281:16-282:25; VI RT 1314:7-1317:9.) This delay was devastating to Sargon's business and reputation. The USC Monte Carlo symposium had produced great enthusiasm and interest in the Sargon Implant, but when no reported results were forthcoming to back up the claims at the symposium, Sargon and its implant lost credibility. (I RT 130:15-25; VI RT 1311:1-1312:15; 1331:14-1332:1.) The delay caused Sargon to lose existing contracts in Saudi Arabia, Korea and Japan, and halted Sargon's attempts to expand in Europe and North America. (I RT 183:28-184:11.)

In addition, when the 1-year reports did finally arrive, they were bereft of much of the information spelled out in the research protocol. (VI RT 1317:10-1318:14.) Suspicions now aroused, Sargon demanded to see all the study patient's records, as allowed in the Agreement. (VI RT 1322:13-1324:20.) But there again, USC delayed, taking many months to assemble and make available only a portion of the patient records. (VI RT 1333:9-27.)

J. Sargon Sues USC And Some Individual Doctors Involved With The Study.

Having had its records request largely ignored by USC and suffering mightily in the marketplace, Sargon sued USC and some individual dentists involved with the study on May 7, 1999. (I AA 10-20; VI RT 1324:21-26.) The chief claim in Sargon's complaint was breach of contract, but it also included claims of intentional interference with prospective economic advantage, trade disparagement and violation of section 17200 of the Business and Professions Code. (I AA 10-20.)

On July 23, 1999 USC answered and filed a cross-complaint against Sargon and Dr. Lazarof claiming Sargon breached the Agreement, along with claims for unfair competition and trademark infringement and dilution. (I AA 21-51.)

Finally, some months later USC provided access to the patient records. (VI RT 1333:9-27.) Sargon's review of those records revealed that many of the patients chosen by USC fell outside the allowed parameters of the research protocol and showed several cases of surgical error. (VIII RT 1889:6-1924:11; 1939:11-1942:21.)

Thereafter, in December 1999, Sargon terminated the Agreement and the study ended. (VI RT 1334:11-27.) Over the next months, the parties engaged in extensive written discovery and took numerous depositions.

K. Trial Court Grants USC's Motion In Limine Regarding Lost Profits.

On July 20, 2001 USC filed a motion in limine to exclude all evidence of lost profits based on lack of foreseeability (the *Hadley v. Baxendale* rule). (I AA 66-216.) The trial court conducted a 9-day evidentiary hearing on the motion, spread over several months from July through October; eventually, on January 24, 2002 the court issued an order granting the motion. (I RT 1-IV RT 963; II AA 349-364.)

The court, applying a directed verdict standard, concluded, variously, that lost profits were not reasonably foreseeable because they were barred by the new business rule and the warranty disclaimers in the Agreement, were not the natural or the probable consequence of a breach of

the Agreement, and were undercut by the disproportionality between the damages sought and the consideration paid. (II AA 349-350, 362-363.)

L. Trial Court Blocks Other Attempts By Sargon To Present USC's Wrongful Conduct To The Jury.

While the lost profits motion in limine was pending, on November 16, 2001 Sargon filed a motion for leave to amend to add various tort claims based upon new information revealed in discovery. (VII AA 1788.) The amended complaint included new claims for conversion, fraud and negligence, and was based, in part, on allegations that USC had altered study patient records, and had accepted a $300,000 donation from Sargon's competitor during the term of the study. The trial court denied the motion and a similar subsequent motion in early 2002 on the procedural ground that there had been prejudicial delay and it was too late to substantially change the nature of the case.

Around the same time, December 6, 2001, Sargon filed a separate complaint against USC alleging these tort claims (the "Fraud Action"). USC demurred and the trial court sustained a demurrer without leave to amend, ruling that the new complaint in the Fraud Action was an improper attempt to split Sargon's causes of action from this existing contract action.[3]

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[3] The denial of the motions to amend and the dismissal of the Fraud Action are the central subject of a related appeal, 2d Civil No. B163707, that has been transferred to this Court and consolidated for oral argument. To avoid unnecessary duplication, for its argument here on the motions to amend (see § II., *post*) Sargon requests in a separate motion that this Court take judicial notice of the relevant portions of the record in the Fraud Appeal. We will refer to that record as the "Fraud AA" or "Fraud RJN."

Also, prior to trial in the contract action here, the trial court granted USC's motions in limine to exclude various pieces of Sargon's evidence: (a) large donations to USC from Sargon's main competitor during the study (V RT 1052:9-15), (b) communications between USC and this competitor, (*ibid.*), (c) use of the Sargon Implant by USC in non-study patients (*ibid.*), (d) USC's breach of confidentiality provisions by producing documents and information in separate litigation (V RT 1054:3-5), (e) a donation to USC made by Sargon at Dean Landesman's request (V RT 1055:1), and (f) certain disparaging comments made by USC professors about Sargon and its implant (V RT 1052:19-24).

M. Trial Proceeds In Contract Case Without Lost Profits; Sargon Recovers Some $460,000 On Its Contract Claim.

Trial in this contract action began on March 7, 2003 and continued for 10 days. After only a few hours of deliberation, the jury reached a unanimous special verdict on March 20, 2003, finding USC liable for damages totaling $433,324.72, and finding no liability on USC's cross-complaint. (X RT 2513:12-2515:21.) The court entered a March 24, 2003 judgment in that amount. (II AA 463-466.) On May 14, 2003 the trial court awarded Sargon pre-judgment interest of $43,755.41 on part of the jury award. (III AA 694-695; VII AA 1755.)

N. The Trial Court Inexplicably Finds USC The Prevailing Party And Awards It Attorneys' Fees.

Both USC and Sargon filed memoranda of costs and competing motions for attorneys' fees and to tax costs. (II AA 473-489; III AA 696-V AA 1318; V AA 1326-VII AA 1753.) As background, on July 3, 2001 USC had served a $501,000 section 998 offer of compromise on Sargon. (V AA 1249-1252.)

At the June 11, 2003 hearing on the motions the trial court reduced the $46,129.20 in pre-998 offer costs that Sargon claimed to $22,075.95. (Fees RT 37:14-39:21; VII AA 1754-1755.)[4] As a result, the court brought Sargon's total recovery to $499,156.08, just $1,843.92 below USC's $501,000 statutory offer.

The trial court then awarded USC *all* of its $50,977.72 in costs under the cost-shifting provisions of section 998. (VII AA 1760.) But the court did not award any discretionary expert witness fees to USC. (Fees RT 61:28-63:12.)

Even though Sargon had recovered almost $500,000 on its contract claim, and USC had failed to recover on the contract claim in its cross-complaint, the trial court nevertheless determined that USC, not Sargon, was the prevailing party on the contract under section 1717 and awarded USC $700,000 in attorneys' fees. (Fees RT 64:27-66:25; VII AA 1756.)

On August 8, 2003 the trial court issued an order (dated June 11) regarding the attorneys' fees/costs awards and attached another version of

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[4] "Fees RT" refers to the reporters transcript of the June 11, 2003 hearing submitted in 2d Civ. No. B169619.

the March 24, 2003 judgment interlineated with the pre-judgment interest, costs and fees. (VII AA 1754-1761.)

O. Sargon Appeals.

On May 21, 2003 Sargon appealed from the March 24 judgment. (V AA 1319-1321.) This final judgment is appealable. (Code Civ. Proc., 904.1, subd. (a)(1).) The appeal is timely. (Cal. Rules of Court, rule 2(a).)

On August 13, 2003 Sargon appealed from the court's post-judgment order on attorneys' fees and costs, and from the interlineated version of the March 24, 2003 judgment. (VII AA 1762-1766.) The post-judgment order is appealable (§ 904.1, subd. (a)(2)), and the appeal is timely (rule 2(a)).

This Court consolidated these appeals on September 26, 2003. (VII AA 1773A.)

STANDARD OF REVIEW

A. Lost Profits.

The trial court granted USC's motion in limine to exclude all evidence of Sargon's lost profits. Our Supreme Court has held "a motion to exclude all evidence on a particular claim is subject to independent review as the functional equivalent of a common law motion for judgment on the pleadings or, if decided in light of evidence produced during discovery, a motion for nonsuit." (*Aas v. Superior Court* (2000) 24 Cal.4th 627, 634-

635, citations omitted; see also *Mechanical Contractors Assn. v. Greater Bay Area Assn.* (1998) 66 Cal.App.4th 672, 677 [A motion to exclude all evidence is considered "the functional equivalent of an order sustaining a demurrer to the evidence, or nonsuit"].) Here, as in *Aas*, "the question is whether, disregarding conflicting evidence, indulging in every legitimate inference that may be drawn from the evidence, and viewing the record in the light most favorable to plaintiffs, evidence of [lost profits] will support a judgment in plaintiffs' favor." (*Aas v. Superior Court, supra*, 24 Cal.4th at p. 635.) And the trial court here purported to use precisely that nonsuit or directed verdict standard in ruling on the motion. (II AA 349-350.)

Also, whether lost profits damages were foreseeable in this case is an issue of law (*Postal Instant Press, Inc. v. Sealy* (1996) 43 Cal.App.4th 1704, 1708, 1709), and is subject to de novo review. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 801.) The trial court was not asked here to make a discretionary ruling, e.g. under Evidence Code section 352, and did not purport to exercise such discretion.

B. Attorneys Fees/Costs Orders.

"The determination of the legal basis for an award of attorney fees is a question of law which we review de novo." (*Honey Baked Hams, Inc. v. Dickens* (1995) 37 Cal.App.4th 421, 424 disapproved on another ground in *Santisas v. Goodin* (1998) 17 Cal.4th 599, 614; see also *Snyder v. Marcus & Millichap* (1996) 46 Cal.App.4th 1099, 1102 ["We exercise independent review over this appeal from the trial court's order because it raises a pure issue of law regarding the entitlement to fees"].) Also, our Supreme Court has made clear that the prevailing party issue may be determined as a matter

of law when there is a "simple, unqualified win" by one party—i.e., a victory by the plaintiff and cross-defendant on "the only contract claim." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876.) In such a case, the "trial court ha[s] no discretion to deny the [plaintiff its] attorneys fees under section 1717." (*Ibid.*)

Generally, costs awards are reviewed for an abuse of discretion. (*Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1298.) However, "when there is a party with a 'net monetary recovery' (one of the four categories of prevailing party), that party is entitled to costs as a matter of right; the trial court has no discretion to order each party to bear his or her own costs." (*Michell v. Olick* (1996) 49 Cal.App.4th 1194, 1198; accord *Reveles v. Toyota by the Bay* (1997) 57 Cal.App.4th 1139, 1151 [settlement by plaintiff with third party did not change mandatory nature of costs].) Likewise, a cross-defendant against whom the cross-complainant obtained no relief "is entitled to all of his costs . . . the court has no discretion to deny costs to the prevailing party." (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 129; accord *Great Western Bank v. Converse Consultants, Inc.* (1997) 58 Cal.App.4th 609, 612 ["Thus, costs are available as a matter of right to a cross-defendant in whose favor a dismissal is entered"].)

C. Motion For Leave To Amend

Denial of a motion for leave to amend is reviewed for an abuse of discretion. (*Dunzweiler v. Superior Court* (1968) 267 Cal.App.2d 569, 576.)

ARGUMENT

I. USC COULD REASONABLY FORESEE LOST PROFITS DAMAGES ACCRUING IF IT BREACHED THE AGREEMENT.

The trial court took the issue of lost profits damages away from the jury. As noted above, the filter through which this Court must review that ruling is unforgiving to USC. The evidence must be viewed in the light most favorable to Sargon, indulging every favorable inference for Sargon, and disregarding any conflicting evidence. If *any* of the evidence might support a jury's conclusion that lost profits damages are reasonably foreseeable, the motion in limine should have been denied. The trial court's ruling cannot withstand this exacting scrutiny.

Contract damages are limited to those which might have been reasonably contemplated or foreseen by the parties, at the time the contract was made, to be a probable result of the breach. (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 456.) If some special circumstances caused an unusual injury, damages are not recoverable unless those circumstances are known to the breaching party. (*Ibid.*)

But the courts have been clear that foreseeability does not require a party to contemplate the precise injury or damages:

> "The existing rule requires only reason to foresee, not actual foresight. It does not require that the defendant should have had the resulting injury actually in contemplation or should have promised either impliedly or expressly to pay

> therefor in case of breach. If, because of his own education, training, and information, he had reason to foresee the probable existence of such circumstances, the judgment for compensatory damages measured by the extent of such injury will be given against him. In such a case the defendant knew or had reason to know of the surrounding circumstances and had such reason to foresee the extent of the resulting injury."

(*Id.* at p. 458, citation omitted.)

Thus, the issue is not whether, at or before the time the Agreement was executed, USC *actually* contemplated that it might be responsible for lost profits damages if it breached the Agreement. Rather, the only question is whether, based on the Agreement's terms or the parties' actions USC had reason to believe its failure to perform would injure Sargon's ability to market and profit from the Sargon Implant. As we discuss, both the Agreement's terms and the parties' actions make it clear that USC not simply should have, but actively did contemplate the commercial exploitation and profits from the implant as a result of proper interim reporting of the study results.

A. The Agreement Contemplates Commercial Use Of The Study Results.

The trial court rejected Sargon's lost profits claim based (among other grounds) on the fact the Agreement did not expressly address lost profits. But this superficial review of the Agreement does not withstand scrutiny. The question isn't whether the Agreement used the term "lost profits," but whether, by its terms, it appears that the parties contemplated this sort of loss would be occasioned in the event of a breach.

Burnett & Doty Development Co. v. Phillips (1978) 84 Cal.App.3d 384 is illustrative. There, the court found contract provisions supported a finding of foreseeability, even though they did not expressly mention lost profits: "The parties planned on the contract being fully performed by October 31, 1972. C. S. Phillips, Sr., personally wrote into the contract at the time of its execution, 'work to be completed by October 31, 1972.' This evidence supports the determination that the parties contemplated or should have contemplated at the time of contracting that the interruption of Burnett & Doty's business, and attendant loss of profits, was likely to result from Phillips' failure of timely performance. Such losses were a foreseeable result of any extensive delay in performance of the agreement." (*Id.* at p. 390.) Thus, the inclusion of the completion date in the agreement created awareness on the defendant's part that if the construction was not completed by that date, plaintiff would suffer lost profits from the delay. (*Ibid.*)

Similarly here, while the Agreement may not use the phrase "lost profits," its plain terms show that the parties certainly understood that the purpose of the Agreement was to provide results, which Sargon could use to promote the Sargon Implant on a wide scale. Indeed, the Agreement specifically mandates that USC provide 1-year interim reports that Sargon may use for marketing. (I AA 86, 129.) What is the purpose of marketing if not to generate profits? Moreover, in Appendix F the Agreement recognizes that the results will be used to support international registration of the implant—clearly contemplating international commercial exploitation of the implant. (I AA 147.)[5]

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[5] USC recognized the importance of Appendix F, going so far as to claim that Appendices D, E and F were not part of the Agreement even though

(continued...)

1. The warranty disclaimers are irrelevant.

The trial court's suggestion that warranty disclaimers in the Agreement somehow foreclosed recovery of lost profits is misguided. (II AA 294, 353-354, 362.) The provision, paragraph 11.2(d), provides that USC does not warrant the results of the study or the commercial exploitability of the implant. (I AA 94.) This simply means that USC (1) does not guarantee that the study, if properly done, will prove the implant is efficacious, or (2) that even if it is efficacious, there will be a market for it. But not guaranteeing certain things is not the same as being fully absolved from liability for *failing* to perform its obligation under the Agreement. Nor does it indicate that USC was unaware of the stakes of failing to adhere to its obligations—namely, disruption of the marketing of the Sargon Implant and consequent loss of profits.

2. The facts known at the time of the Agreement support the foreseeability of lost profits.

Moreover, in exploring the intention of the parties the terms of the Agreement "must be construed in the light of the facts which were known, or should have been known, at the time of making the agreement." (*Christensen v. Slawter* (1959) 173 Cal.App.2d 325, 334.) As we discuss more fully below, the evidence established that USC knew and understood

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[5] (...continued)
they were explicitly referred to in other parts of the Agreement that USC did acknowledge. (I RT 90:8-99:19; IV RT 907:16-911:12.) USC even had a university employee testify that the original agreement only contained Appendices A through C and admit this "original" into evidence with the staples having been removed. (IV RT 892:1-897:8.) The trial court saw through this argument and admitted the entire Agreement into evidence. (I RT 99:12-19.)

a great deal about the commercial implications of this study when it executed the Agreement—therefore it is not surprising the Agreement provides for commercial use by Sargon of the 1-year interim reports. Hence, it was foreseeable to USC that a failure to properly conduct the study and produce these reports would cause Sargon to lose profits.

B. The Parol Evidence Rule, To The Degree The Trial Court Relied Upon It, Does Not Bar Admission Of The Extrinsic Evidence Presented By Sargon.

It is unclear from the trial court's ruling to what degree it relied on the parol evidence rule in granting USC's motion in limine. The court's order stated that the Agreement was integrated, but only explicitly invoked the rule in excluding testimony of one August 1996 conversation between USC and Sargon representatives (see discussion *infra* § I.C.3.). (II AA 356-357.)

And although USC made parol evidence objections during the evidentiary hearing, the trial court reserved ruling on those—and never made a final ruling regarding parol evidence. (E.g., I RT 53:24-54:13; 59:14-20.) USC's failure to obtain a ruling on its parol evidence objection waives that objection. (*Ramsey v. City of Lake Elsinore* (1990) 220 Cal.App.3d 1530, 1540.) Thus, parol evidence concerns about any other evidence except the excluded conversation cannot be a part of this appeal.

Moreover, even as to the excluded conversation, the court's parol evidence ruling was in error. First, it is questionable the rule even applies at all because the evidentiary hearing was not aimed at determining what

the Agreement meant or said, but rather whether lost profits damages from a breach of the Agreement were reasonably foreseeable.

Second, our Supreme Court long ago held that the parol evidence rule allows admission of extrinsic evidence to interpret even an integrated agreement: "The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible." (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc.* (1968) 69 Cal.2d 33, 37.) Given this Agreement's failure to expressly reference lost profits, extrinsic evidence can be admitted to interpret the Agreement's impact, if any, on lost profits damages. (*Ellis v. Klaff* (1950) 96 Cal.App.2d 471, 476 [The rule does not "render inadmissible proof of contemporaneous oral agreements collateral to, and not inconsistent with, a written contract where the latter is either incomplete or silent on the subject"].)

Third, to the extent USC's objections to any post-Agreement parol evidence were not waived, the rule does not bar extrinsic evidence of the parties' statements and conduct after the execution of the Agreement because an integrated agreement "may be explained or supplemented by course of dealing . . . or by course of performance." (Code Civ. Proc., § 1856, subd. (c).)

C. USC Knew Or Should Have Known That A Failure To Properly Conduct The Clinical Study And Provide Timely Reports Would Cause Sargon To Lose Profits.

1. USC was fully aware of Sargon's marketing and sales efforts and that Sargon would use the 1-year interim reports to market and grow its business; indeed, USC went so far as to become actively involved in those marketing efforts.

Even though the foreseeability rule does not require Sargon to show this, the extrinsic evidence demonstrates that USC in fact *was* aware of the importance of the 1-year interim reports to Sargon's ongoing marketing and sales efforts. This awareness is prima facie evidence of foreseeability.

In *Dallman Co. v. Southern Heater Co.* (1968) 262 Cal.App.2d 582, the court found lost profits damages foreseeable because in negotiations leading up to the execution of the agreement "Dallman told Southern that unless the agreed upon services were rendered Dallman 'would suffer the loss of business, customers and good will.'" (*Id.* at p. 596.) This is precisely the situation here. In the many meetings and conversations leading up to the Agreement, Sargon described in detail to Dean Landesman and other USC representatives Sargon's ongoing marketing efforts and sales successes. (I RT 144:7-145:17; 202:19-203:8; 206:20-28; 207:1-209:26; 213:22–214:18; 263:10-22.) Indeed, Sargon insisted it be able to use the 1-year reports precisely to aid in those marketing and sales efforts. (I RT 76:8-81:5; 146:3-147:4; 209:27-211:20; 214:19-26; 242:17-244:13; 269:22-270:20.) And USC knew this. (II RT 399:27-401:16.)

Moreover, Dean Landesman promised that if the 1-year study results were good, USC would consider exclusively using the Sargon Implant. (III RT 690:14-691:21.) And, indeed even before the Monte Carlo Symposium USC decided to make the Sargon Implant the "system of choice for patient care." (I AA 3.) If USC had fully implemented that shift away from the Branemark System to the Sargon Implant, it would have resulted in substantial profits to Sargon. And those profits were reasonably foreseeable at the time the parties entered into the Agreement.

But USC went further. It actually got involved in Sargon's marketing efforts both before and after the Agreement was executed on November 6, 1996:

- Dean Landesman and Dr. Abou Rass pressured Sargon to cancel an already-scheduled symposium in mid-1996 designed to promote the Sargon Implant. (I RT 74:18-26; 265:19-27.) USC suggested that a symposium relaying the 1-year results of the study, with the imprimatur and muscle of USC behind it, would be much more effective. (*Ibid.*) Sargon relented and USC's plan came to fruition. (I RT 74:27-75:9.)
- USC also unsuccessfully asked Sargon to terminate its employment of Drs. Garfield and Robbins because they were associated with UCLA, not USC. (III RT 819:23-820:21.)
- In April 1998 (a little over a year from the commencement of the study), USC sponsored the "First International USC Symposium" in Monte Carlo to publicize the successful study results. (I AA 8-9.) The splashy symposium was paid for by Sargon, in a sum totaling some $172,000. (I RT 131:10-132:28; VI RT 1308:8-

1309:6.) As the brochure for it explains, the symposium was limited solely to discussing the Sargon Implant. (I AA 8-9.)

- Before the Agreement was executed USC appointed Drs. Hobo and Jo—who it knew were Sargon's point men in the Japanese and Korean marketing efforts—as visiting USC professors so that Sargon's marketing efforts in Asia would have USC's name associated with them. (II RT 412:23-413:15.) Drs. Lazarof and Garfield (who were Sargon's scientific team) also were appointed as clinical professors. (II RT 414:4-416:2.)
- USC sponsored training sessions for the Sargon Implant around the world, issuing USC completion certificates to attendees and making a profit of $30,000 to $40,000. (III RT 814:10-816:9; I AA 1.)

2. USC also envisioned great profits for it from this study, both intangible and financial.

At several symposia and conferences, both before and after the Agreement was executed, Dean Landesman had described the Sargon Implant as one of the most revolutionary breakthroughs in dentistry. (II RT 421:26-424:14.) And USC believed that it could profit by being associated with such an important innovation.

- Dean Landesman envisioned that the Sargon Implant could put USC back on the world map as the leading dental institution it was known as in the 1950s. (I RT 58:11-13; II RT 401:17-402:1.) Landesman and Dr. Abou Rass believed the Sargon Implant would make USC the new Gothenberg—a Swedish university associated with the Branemark implant system and the

current world leader in implantology research. (I RT 18:3-14; 265:3-12; II RT 401:17-402:1; 421:26-422:24; 423:1-424:14.)

- Before the Agreement was executed, Dean Landesman and Sargon discussed the construction of a new Sargon Implant Institute at USC, going so far as to look at possible building sites. The institute would be largely funded by a $10-15 million donation from Sargon, which was to come directly from profits of the sale of the Sargon Implant. (I RT 215:13-221:13.)

And besides the $200,000 USC was to receive under the Agreement, other direct financial benefits accrued to USC, as well.

- A few months before the agreement was executed, USC asked for and received a $100,000 donation from Sargon to the dental program. (I RT 224:13-225:14.)
- USC made some $30,000 to $40,000 in fees associated with the Sargon Implant trainings around the world. (I RT 105:10-106:15; III RT 816:6-9.)

All this evidence—of USC's knowledge of and involvement in Sargon's marketing and sales efforts, and of the benefits USC expected to derive from the profits and its association with this revolutionary implant—was more than enough to support a jury's conclusion that it would be reasonably foreseeable that if USC bungled the study it would cause Sargon to lose profits. This is particularly true since this evidence must be given every inference favorable to Sargon and any conflicting evidence must be disregarded.

3. The trial court improperly excluded evidence of a conversation in which USC became directly aware that a breach of the Agreement could cause Sargon to lose profits.

As noted, the evidence admitted by the trial court was more than sufficient to allow a jury to consider Sargon's claim for lost profits. But additional evidence erroneously excluded by the court also bolstered Sargon's claim. Specifically, both Drs. Garfield and Lazarof testified that in August 1996, after USC had appointed Dr. Chee as the study's principal investigator, they met in a Beverly Hills restaurant with Dean Landesman and Dr. Abou Rass. (III RT 701:3-23; 830:28-831:4.) Both Dean Landesman and Dr. Abou Rass acknowledged that if the study went well, Sargon would make "huge" profits. (III RT 701:20-23.) During that conversation, Dr. Lazarof expressed concern about Dr. Chee's appointment and said Dr. Abou Rass was a better candidate. (III RT 701:28-702:16; 829:7-830:7.) Dr. Lazarof warned that Dr. Chee's possible enmity towards him and/or his lack of objectivity about the Sargon Implant could ruin the study and imperil those profits, and asked whether USC would take responsibility in that case. (III RT 701:28-702:21; 829:7-830:19.) Dean Landesman responded, "Yes we are. You have nothing to worry about." (III RT 702:23-24.)

The trial court excluded this testimony because (1) it was barred by the parol evidence rule, (2) the court believed it directly contradicted earlier deposition and trial testimony by the witnesses, and (3) it was introduced too late and was not proper rebuttal evidence. (II AA 357.) None of these grounds withstands scrutiny.

First, as to parol evidence, we have already explained why that rule does not apply here. (See *infra* § I.B.)

Second, as to prior inconsistent statements, this rule requires that there be a direct contradiction from a clear and unequivocal admission. (*Mikialian v. City of Los Angeles* (1978) 79 Cal.App.3d 150, 161; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21.) Thus, in *Mikialian* the plaintiff testified at trial three times that the police had directed him to move his tow truck and the car he was towing to the other side of the street. (*Mikialian v. City of Los Angeles, supra*, 79 Cal.App.3d at p. 154.) The court affirmed that testimony's exclusion because it directly contradicted his deposition testimony that no one had told him to move the car, that it was his decision alone. (*Ibid.*) The reason for this rule, the court said, was that, clear and unequivocal, "admissions against interest have a very high credibility value," particularly when made as part of "an established pretrial procedure whose purpose is to elicit facts." (*Id.* at p. 161.)

But California courts have made clear that this admissions rule "should not be based on tacit admissions or fragmentary and equivocal concessions, which are contradicted by other credible evidence." (*Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, 482.) Here, USC did not identify in the record any specific prior question that clearly and unequivocally asked whether there had ever been discussions that Dr. Chee's appointment as principal investigator could imperil Sargon's profits. (III RT 704:1-707:13; 715:3-716:11; 718:3-7.) Instead, the questions cited by USC inquired as to conversations about who would bear the responsibility for lost profits. (III RT 704:26-707:13.) In short, it was discussion concerning direct negotiation of responsibility for lost profits. But the conversation recounted by Drs. Garfield and Lazarof wasn't about negotiation or who would be responsible for lost profits—it was about Dr. Chee—with lost profits coming up as a side issue. In sum, the conversation was not offered as evidence of direct negotiation of responsibility for lost

profits, but indirect evidence of USC's awareness of the important stakes riding on a failure to perform.

Significantly, the only prior testimony USC pointed to that specifically concerned Dr. Chee was from the deposition of Dr. Garfield:

> "Question: 'Did you express any concern to Dr. Lazarof about him'—meaning Dr. Chee—'being the lead person on the study in light of this hostility that you had experienced in the past with him?' Answer: 'Well, I experienced this hostility, and I discussed it with people who knew him. They said, that's the way he is. I discussed it with Dr. Lazarof. We both decided that it would be best to ignore it because Chee was the chief investigator of the study, and we don't want to make trouble." (III RT 715:10-25.)

However, this was insufficient to establish "a direct contradiction" for two reasons. First, the answer was not directly contradictory because it did not concern the issue of how Dr. Chee's hostility could impact Sargon's profits. At most it suggests that Drs. Garfield and Lazarof at least initially decided not to rock the boat on Dr. Chee's participation. And, it does not rule out the subsequent conversation with Dean Landesman concerning Dr. Chee's negative impact on the study. Second, even assuming it is contradictory, it contradicts only Dr. Garfield's later testimony. It is not a basis to exclude Dr. Lazarof's separate testimony on the issue.

Moreover, the courts have also recognized that if "there is a credible explanation for the inconsistent positions taken by a party," an admission is not binding. (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 396.) Thus, in *Niederer v. Ferreira* (1987) 189 Cal.App.3d 1485, the court allowed admission of plaintiff's declaration even though it was

directly contradictory to her previous deposition testimony because "her supplemental declaration explains this contradiction by her statement she did not understand the question asked of her at the deposition." (*Id.* at p. 1503.) Similarly here, as the witnesses explained to the court, the earlier questioning had always focused on whether *responsibility* for "lost profits" or "commercial risk" had ever been discussed. (III RT 707:28-708:25; 828:28-829:18.) The conversation recounted at trial, however, was triggered by, and focused on, Dr. Chee's appointment, not lost profits or commercial risk. Given the equivocal nature of the contradiction and the credible explanation for any inconsistency, the exclusion of the testimony was improper.

Finally, the trial court's suggestion that the testimony was somehow too late and improper rebuttal testimony is flatly incorrect. (II AA 357.) Neither Dr. Garfield nor Dr. Lazarof testified on this point in rebuttal. Rather, the trial court *recalled* them as witnesses due to USC's sudden announcement that Dean Landesman would not be coming to testify in person (because of fears of flying after September 11) as everyone had planned. (III RT 699:12-700:22; 809:10-13.) Thus, any concerns about new testimony on rebuttal did not apply here.

Dr. Garfield and Dr. Lazarof's testimony concerning the conversation regarding Dr. Chee's impact on the study should have been considered by a jury, just as all the other evidence demonstrating that USC was plainly aware or should have been aware of the potential commercial injury Sargon would suffer if USC failed to properly perform its obligations under the Agreement.

D. Even If Lost Profits Are Viewed As A Special Circumstance Here, They Were Known By USC.

In its order granting USC's motion in limine the trial court makes glancing reference to the fact that "special circumstances" allowing recovery of lost profits did not exist here. (II AA 362.) Yet, with all the conversations concerning Sargon's marketing plan and use of the 1-year reports, lost profits were not "some unusual injury" or a "special circumstance" under foreseeability analysis. Even if one called them an unusual injury, "[w]hen the facts show that a special purpose is intended to be accomplished by one of the parties (a failure to accomplish which by means of the contract would cause him greater damage than would ordinarily flow from a breach by the other party), and this special circumstance is brought to the attention of the other party, damages normally flowing from a breach of the contract in view of such special circumstances are said to be within the contemplation of the parties." (*Christensen v. Slawter, supra*, 173 Cal.App.2d at p. 334.)

In their many dealings, Sargon made USC aware that substantial profits were riding on Sargon's access to timely and accurate 1-year interim reports. (I RT 76:8-81:5; 146:3-147:4; 209:27-211:20; 214:19-26; 242:17-244:13; 269:22-270:20.) USC had specific knowledge of Sargon's marketing strategy and sales history. (I RT 144:7-145:17; 202:19-203:8; 206:20-28; 207:1-209:26; 213:22–214:18; 263:10-22.) Dean Landesman even pointed out that Sargon could make huge profits on this revolutionary implant. (III RT 701:20-23.) Indeed, USC had designs on those profits, namely using $10-15 million of them to construct and establish and new USC dental research institution—the Sargon Implant Institute. (I RT 215:13-221:13.) And Sargon pointed out to USC that Dr. Chee's dislike of

Dr. Lazarof, if it compromised the study, could have serious consequences to Sargon's business. (III RT 701:28-702:21; 829:7-830:19.)

Thus, even if lost profits damages are somehow denominated a special circumstance, USC certainly was on notice about that special circumstance.

E. The Trial Court's Reliance On The Amount of Damages Sought By Sargon Was Improper.

Under the guise of a supposed proportionality rule, the trial court also held lost profits damages were not foreseeable because Sargon was claiming $100 million in profits as a result of a $200,000 contract. (II AA 361, 363.) The proportionality rule is based upon the principle that if damages are wildly disproportionate from the contract price, recovery of damages would be "unconscionable" or "grossly oppressive." (*Postal Instant Press v. Sealy, supra,* 43 Cal.App.4th at pp. 1714-1715.) Thus, in *Postal* a franchisor obtained seven years of future lost royalties after it had terminated the franchise when the franchisee failed to make a few monthly royalty payments. (*Id.* at p. 1708.) The court found these future royalties payments unconscionable because they "distort the relationship between the breach and its remedy and seriously disturb the balance between franchisor and franchisee." (*Id.* at p. 1715.) The court emphasized that the franchise agreement was an adhesion contract, and awarding future royalties "would place a bludgeon in the hands of franchisors in contract disputes with their franchisees" and would "dramatically expand[] the already enormous bargaining gap between [a] franchisor and [a] franchisee." (*Id.* at pp. 1715 & 1717.)

The situation here is strikingly different. First, the focus of the evidentiary hearing was not the amount of profits lost, but rather their foreseeability, so Sargon did not nor was it required to put on any evidence of the *amount* of lost profits. Indeed, "where the fact of damage has been established, the precise amount of the damage need not be calculated with absolute certainty." (*DuBarry Internat., Inc. v. Southwest Forest Industries, Inc.* (1991) 231 Cal.App.3d 552, 562.) The amount of damages sought does not play into the question of whether they are foreseeable. And since the amount of damages was not conclusively established in this hearing, it cannot be said the amount was unconscionable or grossly oppressive.

Second, USC stood to gain substantially more from the Agreement than just the $200,000 in contract payments. USC requested and received a $100,000 donation from Sargon, generated some $30,000 to $40,000 in fees from Sargon Implant trainings, had Sargon underwrite the Monte Carlo Symposium, and expected to use a $10-15 million donation from Sargon's profits to set up a new USC implant institute. And this doesn't count the even more valuable, but intangible benefits USC hoped to reap by capitalizing on the Sargon Implant to rebuild its prestige as a leading dental education institution.

Third, awarding lost profits damages does not "seriously disturb" the balance between a study sponsor and the university conducting the study, nor does it expand any bargaining gap. As this situation shows, USC and Sargon had protracted arms-length negotiations, on equal footing, that culminated in the Agreement. USC went into the Agreement with its eyes open and fully aware of the high rewards for both parties if things went well. There is nothing unconscionable about requiring USC to pay for the profits Sargon lost because USC failed to perform properly.

F. The New Business Rule Does Not Bar Lost Profits Recovery Here.

The trial court also appeared to rely on the new business rule as making lost profits not foreseeable. (II AA 361-363.) The rule is based on the theory that "'where the operation of an unestablished business is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative.'" (*Edwards v. Container Kraft Carton etc. Co.* (1958) 161 Cal.App.2d 752, 759.)

First, Sargon had been operating for a few years, so the new business rule is inapplicable, since there is nothing contingent or speculative. (IV RT 939-958.) Second, the rule is not mandatorily applied: "The [new business] rule is, however, 'not a hard and fast one.' The issue is, rather, whether the damages can be calculated with reasonable certainty." (*S. Jon Kreedman & Co. v. Meyers Bros. Parking-Western Corp.* (1976) 58 Cal.App.3d 173, 184-185, citations omitted; accord *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 890.)

Here, Sargon had a track record of a few years showing sales in various markets. (IV RT 939-958.) Moreover, as Sargon's counsel explained in an offer of proof at the end of the hearing, given Sargon's known sales history, expert testimony could easily establish what the world market for dental implants was and provide a conservative estimate of how much of that market Sargon could have captured. (IV RT 939-958.)

G. The Granting Of The Motion In Limine Constituted Prejudicial Error.

To establish prejudice, Sargon need only establish that "there is a reasonable probability that in the absence of the [trial court's] error, a result more favorable to the appealing party would have been reached." (*Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 677.) Moreover, "[d]enying a party the right to testify or to offer evidence is reversible per se." (*Ibid.* [granting of motions in limine that precluded plaintiffs from offering evidence to establish their case was reversible per se].) That is plainly the case here.

Because of the trial court's ruling, Sargon was precluded from presenting *any* evidence of its lost profits during trial of its contract claim. In fact, no evidence of Sargon's sales history, marketing efforts or lost profits was presented at trial. Thus, Sargon had no chance to recover this type of contract damages from USC's breach of the Agreement. Sargon's prejudice is manifest.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY RELYING ON USC'S ILLUSORY CLAIM OF PREJUDICE TO BAR SARGON FROM LITIGATING THE MERITS OF ITS NEWLY-DISCOVERED TORT CLAIMS.

On November 16, 2001, several months before the lost profits ruling, Sargon tried to add various tort claims to its complaint, based upon new facts it had uncovered during discovery. (Fraud AA 113-125.) The new claims included allegations that USC had altered study patient records and

had accepted $300,000 in donations from Sargon's competitor (Nobel Biocare) during the term of the study. (Fraud AA 126-148.) The trial court denied Sargon's two motions for leave to amend based upon purported bad faith conduct and "prejudicial delay." (Fraud AA 149-150 & 429.)

A timeline of when Sargon discovered the new evidence shows that any prejudice to USC was illusory, or at best, minimal:

January 18, 2001	Sargon's forensic handwriting expert issued a written report confirming that USC had altered study patient records. Sargon provided this report to USC on February 15. (Fraud AA 122, 124.)
Spring/Summer 2001	The parties engaged in promising settlement discussions. (Fraud AA 122, 124; Fraud RJN, Ex. B at p. 3.)
July 13, 2001	Sargon took the deposition of two Nobel Biocare representatives (with USC present) who agree to provide information regarding payments to USC. (Fraud AA 124.)
July 30-Oct. 19, 2001	The court conducted the hearing regarding USC's motion to exclude lost profits evidence. (I RT 1-IV RT 1029.)
Sept. 6, 2001	Nobel sent documents to Sargon (with copies to USC) revealing $300,000 in payments to USC. (Fraud AA 124.)
March 7, 2003	Jury trial. (V RT 1045.)

Thus, Sargon waited only some two months after discovering the Nobel Biocare payments and some ten months after receiving authoritative evidence of document alteration, to seek leave to amend. And for much of the ten months the parties were in delicate settlement discussions that could have been upended by the introduction of new claims seeking punitive damages.

In a strikingly similar situation, the court in *Dunzweiler v. Superior Court, supra*, 267 Cal.App.2d 569 ruled that a ten-month delay from discovery of the new facts, much of which was taken up with settlement discussions, was not undue delay and did not justify denying leave to file a cross-complaint. (*Id.* at p. 580.) The court noted that given the "policy of great liberality in allowing amendments at any stage of the proceeding," it is "a rare case in which 'a court will be justified in refusing a party leave to amend.'" (*Id.* at p. 576.) Indeed, the courts have found it is improper to deny leave to add four new causes of action even less than two weeks before trial. (*Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 759-760.)

Here, by contrast the trial date had not even been set. Although the trial originally was set for July 30, 2001, the court instead commenced the lost profits evidentiary hearing on that date, and had not set a date for the trial on the merits when Sargon filed its motion in November. In fact, trial did not start until March 7, 2003—almost 16 months after Sargon filed its motion.

And even if Sargon's amendment would have caused a trial postponement, as the *Dunzweiler* court noted, if that is the "only possible hardship," it would not establish prejudice. (*Dunzweiler v. Superior Court, supra*, 267 Cal.App.2d at p. 579.) The only other possible prejudice identified by USC was that the June 29, 2001 discovery cut-off prevented it from doing any discovery necessary to respond to the new claims. But

USC's necessity for more discovery is belied by the fact that it always had full access to all the documents and witnesses to counter these new claims and already had designated a handwriting expert. Even if more discovery was required, the trial court could have easily allowed it in the remaining 16 months before trial; indeed, the parties already had stipulated to conduct some discovery after the cut-off. (Fraud RJN, Ex. B at p. 5.)

As *Dunzweiler* explained, unless the defendant establishes undue delay and prejudice—neither of which USC did here—denying leave would be "not only error but an abuse of discretion." (*Dunzweiler v. Superior Court, supra,* 267 Cal.App.2d at p. 577.)

Landis v. Superior Court (1965) 232 Cal.App.2d 548 is also on point. In *Landis* the plaintiff, like Sargon, filed successive motions for leave to amend his complaint based upon new evidence uncovered in discovery. (*Id.* at pp. 551-553.) The court of appeal reversed the trial court's denial of leave to amend, noting that "reversals on appeal are common" where the plaintiff was prevented from fully litigating his claims and the defendant had not established prejudice. (*Id.* at pp. 555-556.) The court found no prejudice because no trial date had been set. (*Ibid.*) But the court went even further in dismissing the defendant's cries of prejudice and lack of diligence:

> "We have been unable to find any case in which denial was upheld where the sole basis on which the court relied was lack of diligence at a stage in the proceeding where pretrial or trial had not been set. . . . [I]t seems unreasonable to deny a party the right to amend where the only apparent hardship to the defendants is that they will have to defend."

(*Id.* at p. 557.)

Likewise, sparing USC from having to answer Sargon's newly-discovered claims appears to be the trial court's sole reason for denying

leave to amend. The success of USC's prejudice and delay argument meant it did not have to address the merits of Sargon's newly-discovered claims in this action. And it's worth noting that the trial court subsequently barred Sargon from asserting these claims in the separate Fraud Action as well, where USC couldn't begin to claim prejudice or lack of opportunity to defend them—a ruling at issue in the fraud appeal. Whatever the trial court's reasons for refusing to require USC to answer serious allegations concerning alteration of study patient records, and "coincidental" acceptance of a $300,000 donation from Sargon's competitor during the term of study, it is plain they do not support its ruling here.

III. THE TRIAL COURT ERRED IN APPORTIONING SARGON'S COSTS AND IN TAXING CERTAIN COST ITEMS—RESULTING IN SARGON HAVING TO PAY ALMOST $51,000 OF USC'S COSTS.

The trial court erroneously reduced Sargon's pre-offer costs from $46,129.20 to $22,075.95 through two attacks: (1) It apportioned costs to already-dismissed individual defendants and (2) it struck certain costs as unreasonable. This improper slicing of more than $24,000 in costs is significant not just because Sargon was deprived of costs to which it was entitled, but because the reduction resulted in Sargon having to pay almost $51,000 of USC's costs. Specifically, the reduction brought Sargon's total recovery to $499,156.08, just $1,843.92 below the 998 offer USC made on July 3, 2001. (V AA 1249-1252.) There is simply no justification for the trial court's reductions.

A. The Trial Court Should Not Have Apportioned Sargon's Pre-Offer Costs Between USC And The Already-Dismissed Individual Defendants.

The trial court struck approximately one-third of Sargon's allowable pre-998 offer costs on the theory that those costs should be apportioned to the individual dentist defendants that had already been dismissed. (VII AA 1755; Fees RT 6:15-8:12; 39:8-19.) But apportionment was not proper.

Under Code of Civil Procedure section 1032, Sargon is the prevailing party for costs purposes both because (1) it is "the party with a net monetary recovery," and (2) it is a cross-defendant "in whose favor a dismissal is entered." (Code Civ. Proc., § 1032, subd. (a)(4).) Being the prevailing party, Sargon is "entitled as a matter of right" to recover *all* its reasonable costs. (Code Civ. Proc., § 1032, subd. (b).) If a party fits into one of the specified prevailing party categories, section 1032 does not provide for apportionment; apportionment is only allowed if none of these categories apply. (Code Civ. Proc., § 1032, subd. (a)(4).)

California courts have echoed this statutory limitation, ruling that apportionment cannot be used just because "some or all of the costs may pertain to causes of action upon which [the requesting party] did not prevail." (*Michell v. Olick*, *supra*, 49 Cal.App.4th at p. 1201.) Thus, in *Nelson v. Anderson*, *supra*, 72 Cal.App.4th 111, the court reversed the trial court's reduction of one of the defendant's costs by two-thirds. The trial court had reduced the costs award because the defendant had previously settled with the other two plaintiffs, creating a windfall because all of its costs were now shifted to the remaining plaintiff. (*Id.* at p. 128.) The trial court also justified the reduction because the settled claims were really the

"driving force" in the litigation. (*Ibid.*) However, the court of appeal reversed, holding that "[w]e have found no statutory authority for reducing allowable costs for any of the reasons advanced by the trial court" and warned that "'[a] court should be cautious in engrafting exceptions onto the clear language of Code of Civil Procedure section 1032.'" (*Id.* at p. 129, citation omitted.)

Similarly, in *Stiles v. Estate Of Ryan* (1985) 173 Cal.App.3d 1057 the court rejected a call for apportionment and held that plaintiff "was entitled to recover her costs as a matter of course under subdivision (a) of section 1032, even though she prevailed against only two of the three defendants." (*Id.* at p. 1066, relying on *Oakes v. McCarthy Co.* (1968) 267 Cal.App.2d 231, 256, citations omitted ["It was not necessary that [plaintiffs] recover on all of their various theories or causes of action or counts. . . . There is no statutory authority nor decisional authority . . . which authorizes this court to accede to their request of apportionment"]; see also *Hadley v. Krepel* (1985) 167 Cal.App.3d 677, 685 [it was an abuse of discretion to reduce defendant's cost award by 80%].)

In slashing one-third of Sargon's costs here, the trial court relied only on *Slavin v. Fink* (1994) 25 Cal.App.4th 722. (VII AA 1756.) *Slavin*, however, presents an entirely different situation. There, a plaintiff in consolidated actions prevailed against only one of two defendants, who were represented by the same counsel. (25 Cal.App.4th at p. 724.) The prevailing defendant then asked for all the costs incurred by *all* defendants from the plaintiff. (*Ibid.*) The trial court refused, and awarded the prevailing defendant only his share of the costs incurred in defending the action. (*Id.* at pp. 724-725.) The court of appeal affirmed, holding that because this situation did not fit one of the prevailing party categories in section 1032, subdivision (a)(4), the trial court had the discretion to

apportion the costs between the prevailing defendant and the non-prevailing defendant. (*Id.* at p. 726.)

But USC cannot invoke *Slavin* here, because it is not a prevailing party. It is Sargon, the prevailing plaintiff, that is seeking costs. The *Slavin* situation, however, did occur earlier in the instant litigation, when the prevailing individual defendants sought costs from Sargon, and the trial court correctly applied apportionment under *Slavin.* But *Slavin* does not stand for the proposition that the costs of a prevailing plaintiff can be apportioned solely because it didn't recover on all theories against all the defendants. And even in *Slavin*, the court only apportioned 5% of the costs to the non-main case (*id.* at p. 725)—here the trial court unilaterally accorded the minor claims against the other defendants a 33% apportionment.

Moreover, except for some of the deposition costs already deducted by USC, the trial court inconsistently failed to apportion the $50,977.72 in costs it awarded USC under section 998 even though some of those costs were also incurred in defending the individual defendants that had prevailed earlier on summary judgment and had already been recovered by those defendants. (II AA 485-489; VII AA 1760.)

There was simply no basis for the trial court to arbitrarily apportion Sargon's cost recovery among the defendants.

B. Sargon's Claimed Costs For Dr. Abou Rass' Airfare And The Symposium Video Were Reasonable and Reasonably Necessary.

The trial court also reduced Sargon's costs claim by striking costs incurred by Sargon (a) to pay for Dr. Abou Rass' airfare to sit for his deposition in Los Angeles, and (b) to buy a video of the USC Monte Carlo Symposium. (Fees RT 4:22-5:24; 37:25-38:10.) These reductions were improper.

1. Travel costs for the Abou Rass deposition.

The trial court reduced Sargon's recoverable costs by $5,400, representing the difference between the first-class airfare of $8,000 paid by Sargon for Dr. Abou Rass to fly from Saudi Arabia to his deposition and an estimated coach fare of $2,600 for that flight. (Fees RT 6:11-14.) Section 1033.5 specifically makes recoverable "travel expenses to attend depositions." (Code Civ. Proc., § 1033.5, subd. (a)(3).) Thus, the only issue was whether the amount of the expenses was reasonable.

First, the reason Dr. Abou Rass flew first class on the long flight from Saudi Arabia was because of a medical condition. (VI AA 1364-1393; Fees RT 5:26-6:7.) Given the medical necessity, the first-class airfare was patently reasonable.

Second, the parties first agreed that USC would reimburse Dr. Abou Rass for the entire airfare, and later that the parties would share the costs of a business or first-class flight. (VI AA 1364-1393; Fees RT 8:27-26:12.) It was only when USC reneged on those agreements at the 11th hour, that Sargon stepped in and reimbursed Dr. Abou Rass for his airfare. (VI AA

1364-1393; Fees RT 8:27-10:6.) Under these circumstances, USC failed to show the $8,000 charge was unreasonable and the trial court abused its discretion in reducing it. USC's reliance below on *Thon v. Thompson* (1994) 29 Cal.App.4th 1546 was misplaced because there the travel costs were claimed by attorneys in the case, not a deponent, there was no acknowledged claim of medical necessity, and no agreement among the parties to pay for the charter flights at issue.

2. Video of the USC Monte Carlo Symposium.

The trial court also reduced Sargon's costs award by $5,000, representing the cost of obtaining a video of the critical USC Monte Carlo Symposium. (VII AA 1755.)

First, this $5,000 cost is reasonable. In *Science Applications Internat. Corp. v. Superior Court* (1995) 39 Cal.App.4th 1095, the court affirmed the propriety of a $101,908 cost for a video developed to help the jury see the difference between dispatch systems. (*Id.* at p. 1104.) The court explained that "if an expense is neither expressly allowable under subdivision (a) nor expressly prohibited under subdivision (b), it may nevertheless be recovered if, in the court's discretion, it is 'reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation.'" (*Id.* at p. 1103, citation omitted.) Video costs are neither specifically enumerated or proscribed in section 1033.5.

Furthermore, what was said and what happened at the Monte Carlo Symposium was important evidence in Sargon's case, and thus the video was "reasonably necessary to the conduct of the litigation." The fact that the video was not admitted into evidence at trial is immaterial; in fact, most

of the deposition transcripts for which both parties recovered costs here were never used at trial.

USC's only argument as to why the video costs were not recoverable was because they constituted excluded "investigation expenses" under section 1033.5(b)(2). (V AA 1238.) But this was not a surveillance video or some other product of gum-shoe investigation—this was direct evidence of what happened at the critical Monte Carlo Symposium. The category of investigation expenses does not fit this video at all.

Second, once again USC has unclean hands because it had frustrated Sargon's more economical efforts of obtaining the video by refusing to produce it in discovery. (V AA 1331.) Now, USC wants to call the costs of its eventual acquisition unreasonable.

Because the video was direct evidence relevant to the issues in this lawsuit, Sargon was entitled to reimbursement of its cost, and the trial court plainly abused its discretion in failing to award it.

C. Reinstatement Of Any Of Sargon's Costs Requires Reversal Of The Cost Award And Rejection Of USC's Cost Claim.

Obviously, reversal of any of the trial court's reduction of Sargon's cost claim requires that a new order be entered awarding Sargon those costs. But reinstatement of any of those costs also requires reversal of USC's cost award in its entirety. This is because USC's cost award was based on Sargon having fallen $1,843.92 short of USC's $501,000 section 998 offer. Reinstatement of any of the claimed costs necessarily means

Sargon's net recovery would exceed the 998 offer. Hence, USC's cost award must be reversed as well.

IV. THE TRIAL COURT ERRED BY FINDING USC THE PREVAILING PARTY UNDER SECTION 1717 AND AWARDING IT $700,000 IN ATTORNEYS' FEES; THE TRIAL COURT SHOULD HAVE FOUND SARGON THE PREVAILING PARTY AND AWARDED IT ITS FEES.

After only a few hours of deliberations (upon the conclusion of a 10-day trial) a unanimous jury awarded Sargon $433,324.78 in damages on its only contract claim against USC. (II AA 463-466.) The jury also found Sargon not liable on any claims in USC's cross-complaint, including a contract claim. (*Ibid.*) The trial court added $43,755.41 in pre-judgment interest and $22,075.95 in costs to Sargon's judgment. (III AA 694-695; VII AA 1755.) Yet even though USC did not recover anything on its cross-complaint and Sargon recovered almost a half a million dollars in compensatory contract damages, the trial court nevertheless found that USC, not Sargon, was the prevailing party under Civil Code section 1717 regarding attorneys' fees. (Fees RT 64:27-66:25; VII AA 1756.) This startling result runs counter to California law interpreting section 1717. This Court should reverse that order with directions to find Sargon the prevailing party and award it the attorneys' fees it sought.

A. Civil Code Section 1717's Standard For Determining The "Prevailing Party."

Section 1717 explains that "the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section." (Civ. Code, § 1717, subd. (b)(1).)

Hsu explained that "in deciding whether there is a 'party prevailing on the contract,' the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources." (*Hsu v. Abarra*, *supra*, 9 Cal.4th at p. 876.)

The prevailing party under section 1717 is the "party prevailing on the contract," leading the Supreme Court to conclude "that the determination of prevailing party for purposes of contractual attorney fees was to be made without reference to the success or failure of noncontract claims." (*Id.* at pp. 873-874.) Thus, USC's argument below that Sargon's failure to win on its non-contract claims showed it was not a prevailing party has no merit. (V AA 1213; VI AA 1544-1545, 1551-1552.)

B. Since Sargon Was The Unqualified Victor In Its Contract Claim And As Against USC's Contract Claim, The Trial Court Had No Discretion To Determine USC To Be The Prevailing Party.

Sargon was awarded almost $500,000 on its contract claim against USC—recovering most of the compensatory damages it sought. This mandated a fee award in Sargon's favor. In *Texas Commerce Bank v. Garamendi* (1994) 28 Cal.App.4th 1234 the plaintiff prevailed on its contract action, but the trial court denied it attorneys' fees, because it construed the predominant issue not to be a factual one (for which most of the attorneys' fees were spent) but rather a "close question of law." (*Id.* at p. 1239.) The court of appeal reversed: "We therefore hold that the trial court erred in failing to award appellants attorney fees. Although the trial court has considerable discretion in fixing the amount of attorney fees, the court may not completely deny them to the prevailing party." (*Id.* at p. 1247.) Likewise here, the trial court could not completely deny Sargon attorneys' fees because it construed the predominant issue to be lost profits.

In *Hsu v. Abarra, supra*, defendant obtained an "unqualified win" when he obtained a dismissal of plaintiff's only contract claim. (*Hsu v. Abarra, supra*, 9 Cal.4th at pp. 876-877.) Given that win, the court concluded the trial court had no discretion but to award attorneys' fees to the defendant. (*Id.* at p. 876; see also *Carole Ring & Associates v. Nicastro* (2001) 87 Cal.App.4th 253, 261 [Defendant "was the party prevailing on the contract as a matter of law" because he defeated plaintiff's only contract claim].)

Sargon also received an "unqualified win" as a cross-defendant against USC's cross-complaint—no relief was granted on any of USC's eleven causes of action, including its contract claim. (II AA 464.) This too mandated an award of fees. (*Berge v. International Harvester Co.* (1983) 142 Cal.App.3d 152, 164 [court reverses denial of fees to a plaintiff/cross-defendant after she prevailed on defendant's cross-complaint].)

Given the unqualified wins by Sargon here, an award of attorneys' fees to it was mandatory. Our Supreme Court summed it up well: "The words 'shall be entitled' reflect a legislative intent that a party prevailing on a contract receive attorney fees *as a matter of right* (and that the trial court is therefore *obligated* to award attorney fees) whenever the statutory conditions have been satisfied. This language would be incongruous if, as the Hsus contend, trial courts retained virtually unlimited discretion to deny attorney fees under section 1717 on equitable grounds." (*Hsu v. Abbara, supra*, 9 Cal.4th at p. 872.)

1. Just because Sargon recovered less than it sought in its complaint did not allow the trial court to declare USC the prevailing party.

The trial court's finding that USC was the prevailing party rested solely on its conclusion that because Sargon did not succeed on its lost profits claim, this meant that Sargon had not obtained its litigation objectives. (Fees RT 64:27-66:12.) Nonsense. As noted, once Sargon prevailed on its contract claim, and defeated USC's cross-complaint, it was ipso facto a prevailing party under section 1717. And, not surprisingly, California courts have repeatedly rejected the proposition that just because

a party does not obtain all of the damages it seeks, it has not "prevailed" for purposes of a fee award under section 1717.

It is well established that the "fact that a party's recovery in an action under a contract is less than the amount he prayed for does not make his adversary the prevailing party within the meaning of Civil Code section 1717." (*Buck v. Barb* (1983) 147 Cal.App.3d 920, 926.) Or as another court put it, defendants "are not prevailing parties within the meaning of Civil Code section 1717 merely because plaintiff's recovery did not correspond to its wildest dreams." (*Sukut-Coulson, Inc. v. Allied Canon Co.* (1978) 85 Cal.App.3d 648, 656.) Just like USC here, the defendant in *Sukut-Coulson* had argued it should be the prevailing party because plaintiff "did not recover the entire amount prayed for in the complaint." (*Ibid.*) The court of appeal summarily rejected this argument, ruling that the finding of defendant's liability under the contract "precludes serious consideration of this claim." (*Ibid.*)

Similarly, in *Mustachio v. Great Western Bank* (1996) 48 Cal.App.4th 1145 the court found plaintiff the party prevailing on the contract even though her claim for punitive damages was rejected on appeal. (*Id.* at p. 1150.) Simply because one type of Sargon's potential damages were taken off the table by the court before trial does not mean that Sargon was not the party prevailing on the contract.

And, in *Trustees of Cent. States, Southeast & Southwest Areas Pension Fund v. Golden Nugget, Inc.* (1988 C.D. Cal.) 697 F.Supp. 1538 the court "reject[ed] [defendant's] position that a party who recovers less than the total relief requested is not a 'prevailing party' and, therefore, precluded from recovering attorney's fees" under section 1717. (*Id.* at p. 1554; see also *Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109

[plaintiff prevailing party under section 1717 even though only recovered $442,000 after seeking $2 million at trial].)

2. The cases on which USC most heavily relied, *Acree* and *Sears*, actually support Sargon.

In its arguments below USC placed primary reliance on *Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385 and *Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136. (V AA 1216-1218.) Yet, review of those cases reveals that they actually support Sargon's position here.

In *Acree* the jury awarded some $1.8 million on part of plaintiffs' contract claim, but denied relief on several other contract provisions. (*Acree v. General Motors, supra*, 92 Cal.App.4th at p. 392.) Even though plaintiffs did not achieve a complete victory, the trial court nevertheless found they obtained the greater relief and awarded them $3.6 million in fees and $155,000 in costs. (*Ibid.*) The court of appeal rejected the defendant's argument that plaintiffs did not prevail because they "recovered only a 20th of what they sought" in their earlier settlement and damages proposals. (*Id.* at p. 403.) This is, of course, precisely the argument USC successfully made to the trial court here.

In *Sears v. Baccaglio, supra*, the plaintiff, guarantor on a lease, sued the building owner to recover $112,000 it had paid the owner on the guaranty. (*Sears v. Baccaglio, supra*, 60 Cal.App.4th at pp. 1140-1141.) The plaintiff asserted the owner had breached the lease and that the guaranty had been revoked. (*Ibid.*) However, the trial court found that the guaranty had not been revoked, thus plaintiff was liable on the guaranty, although it required the building owner to refund to plaintiff $67,000 to offset amounts the owner had been paid from other sources. (*Id.* at p.

1141.) The court of appeal affirmed the award of fees to the defendant building owner under section 1717, noting that plaintiff *had not prevailed on its breach of contract* claim—to the contrary, he "lost his contract action." (*Id.* at pp. 1158-1159.)

Here, in contrast, Sargon *prevailed* on its contract action (and on USC's contract cross-complaint) *and* it obtained a net monetary recovery. (II AA 463-466.) Indeed, the *Sears* court described the rare and narrow situation in which the party with the net monetary recovery would still not be the prevailing party: "In the event one party received earlier payments, settlements, insurance proceeds or other recovery, the court has discretion to determine whether the party required to pay a nominal net judgment is nevertheless the prevailing party entitled to attorney's fees pursuant to section 1717." (*Sears v. Baccaglio, supra*, 60 Cal.App.4th at pp. 1154-1155.) None of these circumstances is present here, and the approximately $500,000 in damages awarded to Sargon are certainly not "nominal." By its plain terms, *Sears* does not apply.

C. USC Did Not Submit Sufficient Evidence To Support The $700,000 Fee Award.

USC apparently was so sure that it would not be found the prevailing party, it never even bothered to submit any real evidence, besides a cursory declaration, to support the attorneys' fees it was claiming in its memorandum of costs. (V AA 1223-1227.) USC's attorneys submitted no bills, invoices, cancelled checks or detailed breakdown of the work they performed. (*Ibid.*) By contrast, Sargon included over 400 pages of detailed invoices for all four years of the litigation. (III AA 728-730; III AA 758-V

AA 1168.) Despite this lack of evidence, the trial court nevertheless awarded USC $700,000 in attorneys' fees. (Fees RT 66:13-25; VII AA 1756.) It was improper to award USC such a large amount of fees on such a dearth of supporting evidence.

In *Asbestos Claims Facility v. Berry & Berry* (1990) 219 Cal.App.3d 9 the court, in reversing an order awarding attorneys' fees, held that "conclusory factual assertions concerning services performed are inadequate to justify an award of such fees." (*Id.* at p. 24.) The court noted that the law firm had failed to submit any invoices or equivalent documentation with the trial court. (*Id.* at p. 25.) The court explained that an "'attorneys' bare statement that 'they have reasonably expended approximately four hundred (400) hours of their time on legal matters . . . ,' standing alone, and failing to disclose the time consumed in performing each individual item of service is in no manner enlightening nor persuasive and in the case at bench insufficient as the basis for a determination by the trial court of the amounts to be awarded.'" (*Id.* at p. 24, quoting *Estate of Fulcher* (1965) 234 Cal.App.2d 710, 717.)

USC's paltry showing here was equally unenlightening and insufficient to support a $700,000 fee award.

CONCLUSION

The trial court improperly took the lost profits issue away from the jury. This Court should reverse the trial court's order granting USC's motion in limine and remand with directions to hold a damages trial limited to determining whether Sargon's lost profits damages were reasonably foreseeable, and if so, how much they were. This Court should also reverse

the order denying leave to amend with directions to proceed to trial on the newly-discovered tort claims.

The trial court also wrongfully turned a trial winner into a judgment loser. This Court should reverse the trial court's orders awarding USC its attorneys' fees and reducing Sargon's costs award, and remand with directions to (1) award Sargon the additional costs sought here, (2) strike USC's cost award, (3) find that USC is not the prevailing party under section 1717, (4) find that Sargon is the prevailing party under section 1717, and (5) award Sargon the reasonable attorneys' fees it sought, plus any attorneys' fees incurred on appeal.

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Respectfully submitted,

GREINES, MARTIN, STEIN & RICHLAND LLP
Timothy T. Coates
Jens B. Koepke

By _____
Jens B. Koepke

Attorneys for Plaintiff and Appellant
SARGON ENTERPRISES, INC.