2d Civil No. 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 REPLY 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

Contrary to USC's spin, this case is not about Sargon Enterprises pursuing a vexatious litigation strategy on whimsical claims. It is about a jury not being allowed to even consider any of Sargon's lost profits evidence or its newly discovered claims that USC tampered with patient records and accepted a virtual bribe from Sargon's chief competitor while it was conducting this study. This case is also about the startling decision to award USC $700,000 in attorneys' fees, even though a jury found it breached the Clinical Trial Agreement and should pay almost a half-million dollars in damages to Sargon, and even though a jury found USC's breach of contract cross-complaint had no merit. Sargon doggedly sought to have these erroneous rulings reconsidered and to have all its claims heard so as to avoid what this Court now faces—the parties having gone through an entire trial with built-in reversible error. USC's inordinate emphasis on Sargon's litigation strategy appears to be a gambit to avoid ever truly facing the merits of Sargon's claim and a tactic to shift the focus from the weakness of its own arguments on appeal.

In fact, the two pillars of USC's argument justifying the lost profits foreseeability ruling collapse at the slightest push. First, almost all its authorities and most of its argument focus on whether Sargon's claimed lost profits are speculative or their amount is excessive. But foreseeability—the only issue decided at the evidentiary hearing—asks whether, at the time the parties made the Agreement, did they or should they have reasonably contemplated that lost profits could probably result from a breach of the Agreement. The amount of the claimed profits or their purported speculativeness is irrelevant to this analysis—those are attacks on the sufficiency of the lost profits evidence that should be made at trial. Second,

the Agreement did not bar commercial use of the study results. To the contrary, it expressly acknowledged that Sargon's half of the "mutual benefit" recited in the Agreement would be its ability to use the 1-year study results to help its marketing and sales effort.

And USC turns a blind eye to the standard of review applicable to the lost profits ruling—de novo review—by ignoring a mountain of evidence that pre-dates the Agreement. This evidence shows 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. The evidence also showed that besides the financial benefits accruing to USC through its association with the Sargon Implant—which USC described as one of the major breakthroughs on the horizon of dentistry—USC also envisioned that this study and its promotion of the implant would allow the dental school to regain the international prestige it had a generation ago. This was more than enough evidence from which a jury could conclude that when the parties entered the Agreement it was reasonably foreseeable that lost profits damages could result in the event of a breach. But the trial court wrongfully excluded even more damning testimony that USC explicitly acknowledged that "huge" profits were anticipated and assured 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. This testimony seals USC's fate.

USC also continues to stubbornly support the trial court's knee-jerk refusal to allow Sargon to add serious tort claims, even though such

amendments should be liberally permitted. The crux of deciding whether to allow amendments is undue delay and prejudice. USC established neither. USC cannot overcome California case law holding that a two-month delay on one new claim and a ten-month delay on another is not undue delay, particularly when much of those ten months was taken up by delicate settlement negotiations. Prejudice cannot exist because, at the time Sargon sought to amend, no firm jury trial date existed, and in fact the jury did not hear the case until sixteen months later. With no pending trial date, and reasonable, excusable delay, denying a jury the chance to hear these serious charges of record tampering and virtual bribery is wrong.

And it is USC that exhibits *chutzpah* by still clinging to the trial court's starkly counter-intuitive and legally incorrect attorneys' fees ruling, even while it abandons the primary authorities it relied on below. USC has not identified any case—because there are none—that say that a defendant that loses almost $500,000 on a plaintiff's breach of contract claim and loses its contract claim in the cross-complaint is nevertheless the prevailing party. No contortion of so-called "litigation objective" by the trial court or USC can change that reality. The trial court's aberrant ruling must be reversed.

USC also abandoned the primary authority the trial court relied on to apportion Sargon's claimed costs, essentially conceding that such apportionment violated Code of Civil Procedure section 1032. Finally, the trial court also erred by striking the reasonable deposition travel costs of a key witness and the cost of acquiring a piece of evidence, a video of the critical Monte Carlo symposium.

No amount of artful rhetoric can hide the fact that, based on the record and governing law, Sargon is entitled to finally have its doggedly-pursued and serious claims heard by a jury.

ARGUMENT

I. SARGON RIGHTFULLY FOUGHT HARD TO AVOID THE BUILT-IN REVERSIBLE ERROR THAT OCCURRED HERE.

USC opens its Respondent's Brief with the fact that Sargon sought review of some of the trial court's erroneous rulings. (RB 1.) It tries mightily and repeatedly to smear Sargon with the vexatious litigant moniker, claiming that Sargon "has used, and misused, the judicial system" and is tilting at windmills with "its palpably meritless claim of lost profits damages." (See RB 1, 2, 4, 10, 18, 62.) What Sargon actually did was try to conserve judicial resources by avoiding what happened here—going through an entire trial with built-in reversible error.

When the trial court inexplicably sought to bar Sargon from even presenting its lost profits evidence, Sargon rightly sought the trial court's reconsideration of that ruling and the higher courts' intervention. When the trial court improperly refused to let Sargon add newly discovered, serious claims of USC's record tampering and virtual bribery from Sargon's main competitor, even though there was no real prejudice to USC, Sargon filed a new complaint since those new claims were not yet barred by the statutes of limitations. Just because Sargon fought doggedly to have USC answer fully before a jury for the damages it caused by botching the clinical study does not make Sargon a vexatious litigant.

And having persuaded the trial court to issue these inexplicable rulings, USC now tries to distance itself from them. On key points, it abandons the chief authorities it and the trial court relied on below, while, at the same time, augmenting the trial court's order with rulings that were not even there.

USC's false recasting of events continues with it saying that besides being vexatious, "Sargon has failed at every level [of court]." (RB 4.) Yet on the issues that the trial court *did* allow Sargon to get to trial on, Sargon had 100% success. Sargon was awarded almost a half-million dollars in compensatory damages on its breach of contract claim, and it defeated USC's cross-complaint. Such a sizable award is not surprising given one juror's comments that "I found it terribly upsetting that in a matter of such seriousness, USC and Dr. Chee performed their duties in such a grossly incompetent manner. . . . I also found it enormously upsetting that Dr. Chee and the University of Southern California would place their own interests, namely harming Dr. Lazarof and advancing non-meritorious defenses above the interests of the patients who could potentially benefit from the Sargon Implant System." (III AA 721:11-12 & 20-23.) And in the related Nowzari case (that USC misleadingly refers to as Sargon II (RB 10, fn. 2)) Sargon won a judgment against Dr. Nowzari on October 1, 2004. (See RJN, Exs. A, B.)

II. THE TRIAL COURT ERRED IN EXCLUDING ALL EVIDENCE OF LOST PROFITS.

Contract damages, such as lost profits, 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.) This foreseeability principle "does not require that [USC] should have had the resulting injury actually in contemplation" or that USC "should have promised either impliedly or expressly to pay [for lost profits] in case of breach." (*Id.* at p. 458, citation omitted.)

The trial court held an evidentiary hearing to determine whether Sargon's lost profits were foreseeable. And despite a mountain of evidence, the court erroneously concluded that, as a matter of law, they were not foreseeable.

A. USC And The Trial Court Improperly Ignored Many Facts, Particularly Those Pre-Dating The Agreement, That Show The Foreseeability Of Lost Profits.

USC concedes that the trial court's lost profits ruling must be reviewed de novo. (RB 29.) Yet, USC disregards that standard of review by ignoring a litany of evidence preceding the execution of the Agreement. Indeed, the Statement of Facts in USC's Respondent's Brief only starts with the execution of the Agreement. (RB 5.) A long list of facts that pre-date the Agreement, however, show that USC was or should have been aware of the probable risk of lost profits from a breach of the Agreement:

- Sargon described in detail its ongoing marketing efforts and sales successes to USC's Dental School Dean, Howard Landesman, and to other USC representatives, and USC knew that Sargon insisted it be able to use the 1-year reports from the clinical study precisely to aid in those marketing and sales efforts. (I RT 144:7-145:17; 202:19-203:8; 206:20-28; 207:1-209:26; 213:22-214:18; 263:10-22 [sales and marketing efforts]; I RT 76:8-81:5; 146:3-147:2; 209:27-211:20; 214:19-26; 242:17-244:13; 269:22-270:20; II RT 399:27-401:16 [use of 1-year reports].)
- But Sargon went further—it told USC of specific impending deals in Japan, Korea and Saudi Arabia and the importance of the

1-year reports to those deals. (I RT 202, 207-214, 221; see I RT 210:4-5 ["that one year report was the golden report that would be needed to tie everything together"] & 214:24-26 ["It was that one year level of reporting, that would tie U.S.C. in a written report supporting the Sargon Implant"].) In fact, 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.)

- At several symposia and conferences, Dean Landesman had described the Sargon Implant as one of the most revolutionary breakthroughs in dentistry. (II RT 421:26-424:14.) He 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.)

- 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—which institute was to be largely funded by a $10-15 million donation from Sargon's implant profits. (I RT 215:13-221:13.)

- USC successfully pressured Sargon to cancel an already-scheduled symposium in mid-1996 designed to promote the Sargon Implant, suggesting that a USC-sponsored symposium relaying the 1-year results of the study would be better. (I RT 74:18-75:9; 265:19-27.)

- 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 also unsuccessfully asked Sargon to terminate its employment of Drs. Robert Garfield and Marty Robbins because they were associated with UCLA, not USC. (III RT 819:23-820:21.)

- USC appointed Drs. Sargon Lazarof and Garfield (who were Sargon's scientific team) as clinical professors, and Drs. Sumiya Hobo and Young Hwan Jo—who USC knew were Sargon's point men in the Japanese and Korean marketing efforts—as visiting professors so that Sargon's marketing efforts would have USC's name associated with them. (II RT 412:23-413:15; 414:4-416:2.)

USC fails to mention any of these important facts. 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 cannot be ignored—as USC and the trial court did—but must be given every inference favorable to Sargon.

Several salient facts after the Agreement was entered also show that USC was or should have been aware of the potential for lost profits:

- In April 1998, USC sponsored (and Sargon paid for) the "First International USC Symposium" in Monte Carlo solely to publicize the successful 1-year study results. (I AA 8-9; I RT 131:10-132:28; VI RT 1308:8-1309:6.) Indeed, before the Symposium, the USC organizers wrote: "We think that Sargon

will benefit immensely from this program financially from sales of [its] implant." (I AA 6.)

- And USC concedes that soon after the study began it sponsored "continuing education courses to train dentists to use the [Sargon] Implant"—essentially, USC acting as a marketer of the implant. (RB 7.) USC issued attendees at these world-wide training sessions USC completion certificates and pocketed fees of $30,000 to $40,000. (III RT 814:10-816:9; I AA 1.)
- USC decided to make the Sargon Implant the "system of choice for patient care," and began using it in classes and on patients in its dental program outside of the clinical study. (I AA 3.) In fact, 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.)

Thus, to construe the relationship between USC and Sargon as simply a one-time research job completely ignores that both parties expected the alliance to be long-term and highly profitable for both of them.

B. The First Pillar Of USC's Argument—That The Agreement Was Noncommercial—Collapses Because The Language Of The Agreement Negates It.

Not only does the extrinsic evidence surrounding it, but the Agreement itself—both the provisions present and absent—supports a finding that the parties could have reasonably contemplated the possibility of lost profits in the event of a breach. USC tries to evade this inevitable conclusion by mistakenly labeling the Agreement as completely non-commercial. (RB 6, 36.) For example, USC ignores the operative de novo

standard of review by selectively citing Dr. Lazarof's testimony to conclude that USC's "sole interest" and the study's only purpose was to determine the efficacy of the Sargon Implant. (RB 12, 36-37.) What Dr. Lazarof actually said during the colloquy cited by USC was:

> "[T]he efficacy of the implant was already proven, and this implant was FDA approved. The purpose of the study was basically to do those things for the university's benefit, so they could go ahead, and adopt the system, teach it, and help me market it worldwide . . . . [Sargon] needed U.S.C.['s] backing, and U.S.C. asked me to give them a year, to prove it to themselves, then we will be partners. They will profit from the implant in [the] education research aspect of it, and [Sargon will] be profiting from [the] sales of it."
> (I RT 169:7-11, 171:9-13.)

Review of the Agreement supports Dr. Lazarof's testimony that it had a plainly commercial purpose.

1. Although the Agreement doesn't explicitly use the term "lost profits," it expressly acknowledges that Sargon will make commercial use of the study results.

Although the Agreement doesn't use the term "lost profits," its provisions illustrate that the study had a commercial facet that both parties understood. The Agreement starts by reciting that Sargon has developed this patented dental implant and that the clinical trial "is of mutual interest and benefit" to USC and Sargon. (I AA 86.) Since Sargon was in the sole business of selling its dental implants, what "benefit" could possibly accrue to Sargon but a commercial one?

In fact, the Agreement acknowledges the commercial benefits to Sargon even more explicitly. USC fails to mention that a key negotiating point was that Sargon would have the ability to use the interim 1-year study results to market its implants. (I RT 76:8-81:5; 146:3-147:2; 209:27-211:20; 214:19-26; 242:17-244:13; 269:22-270:20; II RT 399:27-401:16.) That ability was expressly included in the research protocol, which is part of the Agreement. (I AA 129[¶10].) Again, what possible use could Sargon make with the 1-year results except a commercial use? Also, Appendix F of the Agreement specifically provides that "the results may be used in connection with application for registration of the implant procedure internationally." (I AA 147.) Since Sargon's sales focus at this time was international, this provision directly acknowledged that the parties understood that Sargon would be making commercial use of the study results.

These various provisions in the Agreement, by their very terms, show that commercial use of the study results was explicitly foreseen by the parties. If those results were faulty or unduly delayed, it is patently foreseeable that it would negatively impact Sargon's commercial use of them, resulting in lost profits. This conclusion is even easier to reach when one accords the required favorable inferences to this evidence. USC again ignores this governing standard of review by arguing that Dr. Lazarof's testimony contained "concessions" that lost profits were not foreseeable (RB 13), even though in the exact testimony that USC cites Dr. Lazarof stated that the study "obviously [was] for commercial reasons." (I RT 161:20-21.)

2. The publicity section in the Agreement does not prohibit Sargon's commercial use of the study results; if anything, it acknowledges that commercial use.

As USC acknowledges (RB 36), the Agreement does not expressly bar Sargon's recovery of lost profits, although USC could have negotiated for such a provision. So instead, USC claims that the publicity section in the Agreement "prohibited" Sargon from making "any" commercial use of the study. (RB 6.) Not so. The publicity section merely prohibits Sargon from making nonconsensual use of USC's "name, trade name, [or] trademark"—it had nothing to do with using the study's results. (I AA 89[¶6].) And, if anything, the publicity section supports the foreseeability of lost profits. It was only because USC knew that Sargon was actively marketing its implant and would be using the 1-year study results as part of that marketing that USC wanted to ensure that its name would not be exploited in those marketing efforts without its consent. (I RT 166:6-20.)

3. The disclaimers in the Agreement do not exclude lost profits as contract damages, but instead support their foreseeability.

Likewise, the disclaimers that USC puts so much weight on do not prohibit commercial use of the study results or exclude lost profits as contract damages. (RB 36, 38.) Instead, USC's insistence on these disclaimers in the Agreement shows it was fully aware of the risk of lost profits. The only reason to insert these disclaimers into the Agreement was because, as amply shown by all the extrinsic evidence, both parties knew that Sargon *would* be making commercial use of the study results which

could result in "huge" profits. (III RT 701:20-23.) If commercial use and resulting lost profits was not contemplated, there would have been no reason to add these disclaimers.

Furthermore, this section of the Agreement is not a disclaimer of liability—it is a disclaimer of *warranty*. It simply disclaims any representations by USC "that any particular results, inventions or discoveries will be achieved," or that the results "will be commercially exploitable." (I AA 94[¶11.2(d)].) That is not what Sargon sued about. In fact, as USC agreed, the results were good. Sargon's suit was not for breach of any warranty, which is the only type of claim these disclaimers could prevent. Rather, Sargon sued for breach of contract because USC did not provide the 1-year results until 2 years after the study began, and because the long-delayed results lacked much of the information spelled out in the research protocol. (I RT 115:17-118:4; 281:16-282:25; VI RT 1314:7-1318:14.) Sargon also sued because USC committed surgical errors in conducting the study and used patients that fell outside the parameters allowed in the research protocol. (VIII RT 1889:6-1924:11; 1939:11-1942:21.)[1]

The focus of the disclaimers was that USC would not guarantee that the results would be positive or commercially helpful. So if Sargon had sued because a properly-performed study yielded negative results, the disclaimers would come into play. Likewise, if Sargon sued because a properly-performed study yielded positive results but did not generate any sales, the disclaimers could be invoked. But not guaranteeing positive

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[1] USC again skirts the standard of review and ignores this evidence by repeatedly misconstruing Sargon's suit as only a claim that USC failed to "deliver a one-year interim report in usable form." (RB 1, emphasis omitted; see also RB 8, 11, 16, 39.)

results or sales from positive results is quite different than saying that USC is fully absolved from paying lost profit damages for failing to perform under the Agreement. And the claim here is that if USC had complied with the contract, Sargon could have used those undisputedly positive 1-year results to help market its product, which is exactly what the Agreement allowed.

Moreover, if USC truly believed that lost profits damages were unforeseeable because the disclaimers barred their recovery, it could simply have moved for exclusion of lost profits damages as barred by the disclaimers. But USC never did that. That decision was sensible since, even if Sargon had brought a warranty claim, our Supreme Court has held that "any disclaimer or modification must be strictly construed against the seller," must be conspicuously displayed and must use "words that clearly communicate that a particular risk falls on the buyer." (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 119.) Under such a test, the disclaimers here could never be viewed as Sargon waiving any right to lost profits damages.

Such a claim by USC would also fail for a separate reason. Disclaimers cannot be construed to create bars if that contradicts express warranties in other parts of the contract. (*Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 Cal.App.3d 951, 957-958 [disclaimer had no effect on separate express warranty]; Comm. Code, § 2316, subd. (1).) In the recitals to the Agreement USC warranted that it was "a recognized leader in the fields of dental education, research and treatment, with expertise in the clinical testing and evaluation of dental materials." (I AA 86.) Since Sargon's claim for lost profits was based on USC's bungling of the study—in other words that USC lacked "expertise in the clinical testing" of implants—the ambiguous disclaimers could never be construed to limit a suit on this separate express warranty in the Agreement.

C. The Trial Court Should Have Admitted The Lazarof/Garfield Testimony.

The extrinsic evidence of the close, commercial relationship between USC and Sargon and the explicit provisions and silences in the Agreement were more than enough to conclude that lost profits damages were reasonably foreseeable. But the trial court erroneously excluded additional evidence that made USC's awareness of the risk of lost profits even more obvious.

In August 1996, Drs. Garfield and Lazarof met with Dean Landesman and Dr. Marwan Abou Rass in a Beverly Hills restaurant to discuss USC's appointment of Dr. Chee as the study's principal investigator. (III RT 701:12-702:2.) In that conversation, the USC representatives acknowledged that if the study went well, Sargon would make "huge" profits. (III RT 701:20-23.) Dr. Lazarof expressed concern that Dr. Chee's historical enmity against Dr. Lazarof and his stated preference for Sargon's competitor, the Nobel Biocare 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.)

Contrary to USC's distortion of the trial court's ruling (RB 33-35), the sole grounds the court gave for excluding that testimony were that (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.) USC abandons the last ground by acknowledging that it was not rebuttal testimony, but rather that these witnesses were recalled. (RB 34-35.)

USC also now says that prior statements do not have to be directly contradictory (RB 34), thus abandoning its and the trial court's reliance on *Mikialian v. City of Los Angeles* (1978) 79 Cal.App.3d 150, which was predicated on direct contradiction. In fact, USC fails to quote any prior testimony by Drs. Garfield or Lazarof that is directly contradictory, and contrary to USC's suggestion, the trial court never found "obvious contradictions." (RB 15.) This is because, as shown in the Opening Brief, there weren't any. (See AOB 33-35.) In fact, the prior testimony USC cites (RB 15) shows there was no contradiction—Dr. Lazarof agreed that Dean Landesman never said that USC "would *not* be responsible" for lost profits. (I RT 240:22-28, emphasis added.) That is entirely consistent with Dr. Lazarof's later stricken testimony.

Instead, USC relies on dicta in the trial court's ruling, namely a quotation about "transparent prevarication" from *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 654. (RB 34, citing II AA 357-358.) In *Roddenberry*, however, the trial testimony was directly contradicted by prior judicial admissions, which USC did not show here. (*Roddenberry v. Roddenberry, supra,* 44 Cal.App.4th at p. 654.) Moreover, if the trial court did rely on the "prevarication" concept, it would have violated the principle on nonsuit determinations (the governing standard here) that a court "may not weigh the evidence or consider the credibility of witnesses." (*Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.* (2001) 88 Cal.App.4th 439, 444, internal quotation marks omitted.) That the court violated that principle and did consider credibility is exhibited by this statement in its ruling: "I cannot credit [Dr. Lazarof's] explanation." (II AA 357.)

In the next section, we will discuss why the trial court's last stated basis—the parol evidence rule—also does not justify the exclusion of this evidence.

D. The Parol Evidence Rule Was Not Relied Upon By The Trial Court, But In Any Event It Does Not Apply.

USC half-heartedly and misleadingly argues that the trial court's lost profits ruling "rests on . . . the parol evidence rule." (RB 30.) Far from it. The court's order only explicitly invoked the parol evidence rule in excluding the testimony discussed in the previous section (see discussion *infra* § I.C). (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 evidence other than the excluded conversation are not properly at issue in this appeal.

And 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 as long as "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. Co. (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 [extrinsic evidence admissible when the agreement "is either incomplete or silent on the subject"].)

E. The Second Pillar Of USC's Argument—That Sargon's Lost Profits Evidence Is Speculative—Is Irrelevant To The Foreseeability Analysis At Issue Here.

In its Respondent's Brief, USC tries to warp the foreseeability issue here—about which the trial court held the evidentiary hearing—into a question of whether Sargon's evidence of lost profits was speculative. (RB 32-33.) Through a miscitation, USC even tries to annex speculativeness to the trial court's ruling by simply tacking it on to a quote from the ruling. (RB 17, citing II AA 363.) In fact, the trial court explicitly held that it was not deciding whether Sargon's lost profits were speculative. The court's ruling acknowledged that USC had also filed motions in limine to exclude Sargon's evidence of lost profits as speculative or for lack of causation, but ruled that it was only granting the foreseeability motion, and that "[t]he other [motions] are moot." (II AA 349.)

More importantly, the foreseeability analysis (i.e., the *Hadley v. Baxendale* rule) does not involve what the amount of damages are or whether they are speculative. Foreseeability is just that—at the time the Agreement was made, was it or should it have been reasonably contemplated by USC that Sargon's lost profits could be a probable result of its breach. Once it has been determined whether the lost profits damages were foreseeable, the question might become has Sargon provided sufficient

evidence to establish what their amount is and whether they are reasonably certain, rather than speculative.

Accordingly, the series of cases that USC primarily relies upon in its attack on the lost profits issue are irrelevant and inapplicable.[2] A brief discussion of the two main cases USC cites shows their inapplicability. In *Resort Video v. Laser Video, supra,* defendant had brought a motion in limine to exclude all evidence of plaintiff's lost profits from the breach of contract, but the court allowed plaintiff to present its lost profits evidence. (35 Cal.App.4th at p. 1686.) After the jury rendered a verdict in plaintiff's favor, the trial court granted defendant's motion for new trial based on excessive damages and the insufficiency of the lost profits evidence. (*Id.* at p. 1689.) In agreeing that the evidence of lost profits was speculative, the court of appeal stated the case "concern[ed] the sufficiency of evidence," and held that "[t]he issue of whether [plaintiff] should be awarded damages is not in dispute, only the amount of the award." (*Id.* at pp. 1684, 1701.) Likewise, USC's claim that Sargon's lost profits damages are speculative only becomes ripe once Sargon has had a chance to present that evidence to a jury; it is immaterial to the foreseeability issue involved here.

Similarly, *Berge v. International Harvester, supra,* does not address the foreseeability of lost profits. Rather, the court affirmed the granting of a new trial on damages, because the "net profit figure calculated was entirely speculative"—i.e., the insufficiency of the evidence.

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[2] See *Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679; *Berge v. International Harvester Co.* (1983) 142 Cal.App.3d 152; *Fisher v. Hampton* (1975) 44 Cal.App.3d 741; *MacMorris Sales Corp. v. Kozak* (1968) 263 Cal.App.2d 430; *Handley v. Guasco* (1958) 165 Cal.App.2d 703; *Gibson v. Hercules Mfg. Co.* (1927) 80 Cal.App. 689; *California Press Mfg. Co v. Stafford Packing Co.* (1923) 192 Cal. 479 [all cited at RB 32-33].

(142 Cal.App.3d at p. 163.) In remanding for a new trial, the court afforded plaintiff a chance to put on additional evidence to support its lost profits claim and spelled out in detail how plaintiff could establish those lost profits. (*Id.* at pp. 162-163.) Here, the trial court erroneously did not even allow Sargon to present any of its lost profits evidence.

The only case USC cites that mentions foreseeability is *Automatic Poultry Feeder Co. v. Wedel* (1963) 213 Cal.App.2d 509, but even there the foreseeability of damages was not the basis of the court's decision. *Automatic Poultry* does, however, provide a roadmap for what the trial court here should have done. Wedel raised turkeys for another party and bought feeding equipment from Automatic Poultry under a contract with a warranty of suitability. (*Id.* at p. 511.) The equipment turned out not to be suitable, starving a number of turkeys, and causing Wedel to sue for the lost profits he would have earned in the form of a bonus for having a less than 10% mortality rate on his farm. (*Id.* at pp. 511-512.) The trial court determined that the machinery was unsuitable and that Wedel should recover as damages the bonus he would have earned. (*Id.* at p. 512.) The Court of Appeal upheld the liability determination, but reversed as to damages. (*Id.* at p. 518.) Although the court mentioned the foreseeability of the damages, it rested its decision chiefly on its view that the trial court "placed itself in the position of speculating that there would not be any additional mortality" and because the damages had not been "proven with reasonable certainty." (*Id.* at pp. 515-516.) Thus, the court approved of allowing the fact-finder to hear the evidence of lost profits, but questioned whether the evidence was sufficient to establish the loss with reasonable certainty. Here, the trial court also should have allowed Sargon to present its lost profits evidence to the jury, and then confront whether that evidence was sufficient and reasonably certain.

1. The purported amount of Sargon's lost profits is equally irrelevant to the foreseeability question.

Likewise, USC's repeated emphasis on the purported amount of lost profits that Sargon was seeking is irrelevant. (See RB 3, 12, 27, 28, 29, 35, 41, 42, 50, 63.) The amount of its damages was not the focus of the lost profits evidentiary hearing, rather the issue was whether any amount of lost profits would be foreseeable. Sargon understood this. Contrary to USC's incorrect description of Sargon's argument below (RB 11), Sargon never raised the amount of its lost profits in arguing against USC's motion. (I AA 229-236.)[3]

2. Reliance on the supposed proportionality rule also does not justify the trial court's foreseeability determination.

USC's lack of evidence of Sargon's claimed lost profits also undercuts the other way USC tries to sneak the alleged amount of lost profits into the foreseeability analysis—the supposed proportionality rule. (RB 42-43.) A proportionality argument is premature here. As shown

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[3] It is not surprising then that USC did not muster any real evidence that Sargon sought lost profits damages "into the range of $300 or $400 million." (RB 12.) First, USC relies on a statement in the trial court's nonsuit order—made without citation to any evidence—that Sargon claimed damages in "the area of $100 million." (*Id.*, quoting II AA 352.) The trial court's bald statement is not evidence of a fact. Second, USC cites argument in its own motion for attorneys' fees; that is not evidence either. (RB 12, citing V AA 1213; see also *El Dorado Irrigation Dist. v. Superior Court* (1979) 98 Cal.App.3d 57, 62 ["Argument of counsel of course is not evidence"].) Third, USC relies on Dr. Lazarof's testimony that it was foreseeable that USC would bear the risk of Sargon's lost profits greater than $100 million. (RB 12, citing I RT 206:6.) That is not evidence that Sargon suffered lost profits damages in a certain amount.

above, Sargon rightfully did not address the amount of its lost profits at the evidentiary hearing; thus, it is impossible to decide whether the amount is proportional. USC may, of course, raise that issue once the jury has heard all of Sargon's evidence as to how much lost profits it lost.

Moreover, to the degree the disproportionality rule applies at this stage at all, it is designed to avoid having an "unconscionable" amount of lost profits damages "seriously disturb" the balance between the contracting parties. (*Postal Instant Press, Inc. v. Sealy* (1996) 43 Cal.App.4th 1704, 1714-1715; see also AOB 37-38.) In the circumstances here, it is not unconscionable to hold USC liable, even for millions of dollars in lost profits. USC held itself out as "a recognized leader in the fields of dental education, research and treatment, with expertise in the clinical testing and evaluation of dental materials." (I AA 86.) USC charged $200,000 for the study, 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. (See *infra*, § I.A.) 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. (*Ibid.*) Moreover, contrary to USC's repeated mischaracterization of this as a "pilot study," it was a full-fledged, multi-year clinical trial. (RB 1, 11, 37-38, 39, 62.) Indeed, it was an important enough study to USC that the university featured it on its website (I AA 2), and spent $172,000 of Sargon's money to host a lavish symposium solely to extol the virtues of the study results and the Sargon Implant. (I AA 8-9; I RT 131:10-132:28; VI RT 1308:8-1309:6; 1346:9-14.)

In that context, holding a university to answer for its failure to perform properly under the Agreement does not seriously disturb the relationship between a study sponsor and the university conducting the study. Indeed, major universities, like USC, increasingly are joint venturers in highly profitable commercial applications of scientific and medical research, and controversies about those profits end up in court. (See *Shaw v. Regents of University of California* (1997) 58 Cal.App.4th 44 [dispute over the University of California's policy of sharing 50/50 the royalties earned from patents developed by employees]; *Moore v. Regents of University of California* (1990) 51 Cal.3d 120 [leukemia patient states claim for breach of fiduciary duty because UCLA physician, without informed consent, used some of his cells to develop a patented cell line, which was to be commercially developed in joint venture with a private company in a potentially $3.01 billion market].)

Thus, USC's plaintive wail that as an impoverished, nonprofit educational institution it should not have to face lost profits damages rings hollow. (RB 43.) As of 1999 USC had amassed a $1.4 billion endowment,[4] and paid its attorneys almost $1.5 million to engage in a scorched-earth litigation strategy—i.e., it admitted it deposed Dr. Lazarof for *six* days and Dr. Garfield for *five* (RB 15) and filed an 11-count cross-complaint (I AA 29-51)—rather than quickly conceding its faulty handling of the study and reimbursing Sargon for its compensatory damages. USC should not be allowed to walk away from the risks of its litigation brinksmanship by pleading false academic poverty.

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[4] See article at: http://www.scienceblog.com/community/older/1999/E/199904179.html.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING SARGON'S MOTION TO AMEND.

Several months before the lost profits ruling, Sargon sought leave to add claims to its complaint, based on 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.)

Because of the "policy of great liberality in allowing amendments," the gravamen of a motion to amend is prejudicial delay. (*Dunzweiler v. Superior Court* (1968) 267 Cal.App.2d 569, 576.) Indeed, "it is not only error but an abuse of discretion" for a court to deny a motion to amend where a defendant did not establish undue delay and prejudice, and where denial "results in a party being deprived of the right to assert a meritorious cause of action." (*Id.* at p. 577.) USC did not establish either undue delay or prejudice here.

A. USC Did Not Show Undue Delay.

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. (See AOB 41.) 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. (*Ibid.*) Two months cannot constitute undue delay and ten months were not deemed too long in *Dunzweiler v. Superior Court, supra.* (267 Cal.App.2d at p. 580.) In fact, the proffered reason for the ten-month delay in *Dunzweiler* was the exact same as here—ongoing settlement discussions.

B. USC Also Did Not Establish Any Prejudice.

USC fared no better as to prejudice. Any claimed need by USC for 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.) By contrast, in *Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, which USC relies upon, plaintiff sought an amendment only 3 days before trial that involved several witnesses and documents about which no discovery had been done, even though plaintiff had been aware of this new claim for two years. (*Id.* at pp. 486-487.)

USC tries to dodge its failure by arguing prejudice is patent, because trial had already started when Sargon tried to amend. And in the other main cases USC cites, *City of Stanton v. Cox* (1989) 207 Cal.App.3d 1557 and *Stockton v. Ortiz* (1975) 47 Cal.App.3d 183, the trial on the merits had begun. That was not the case here. Although the jury 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 on November 16, 2001. In fact, the jury trial did not start until March 7, 2003—almost 16 months after Sargon filed its motion. (V RT 1045.) Courts have found no prejudice where a plaintiff added four new causes of action even less than two weeks before trial. (*Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 759-760.) By contrast, a 16-month period cannot constitute prejudice.

USC also wrongly states that the trial court ruled that Sargon's allegation that during the study USC improperly accepted sizable donations

from Sargon's main competitor was "immaterial" because the Agreement allowed such donations. (RB 20.) First, the court never said anything about immateriality. (IV RT 1040:27-1041:3.) Second, the Agreement only says that USC was allowed to engage in "similar studies" with other parties. (I AA 88[¶2.3].) The Agreement does not absolve USC from the patent conflict of interest in accepting a $300,000 donation from Sargon's competitor while it is conducting a study that could result in USC replacing its use of the competitor's implant with Sargon's.

C. Sargon Did Not Engage In Gamesmanship In Seeking To Amend.

USC's final gambit is to claim denial was proper because Sargon engaged in "gamesmanship." (RB 47, 50-51.) USC's righteous indignation rings hollow. The trial court gave no explanation for why Sargon's motion exhibited gamesmanship. (Fraud AA 150.) USC tries harder. It says Sargon sought to amend "to evade the trial court's exclusion of evidence of Sargon's claimed lost profits." (RB 50.) But Sargon sought to amend on November 16, 2001, more than two months *before* the trial court's January 23, 2002 lost profits ruling. USC also argues the amendment sought to "circumvent" the trial court's dismissal of Sargon's claims against some of the individual defendants on summary judgment. (RB 50.) But the new claims of record tampering and improper donations had nothing to do with these individual defendants, they focused on USC and Dr. Chee's conduct.

Sargon's actions are a far cry from that of the defendant in the case cited by USC, *Green v. Rancho Santa Margarita Mortgage Co.* (1994) 28 Cal.App.4th 686. In *Green*, defendant "offered no excuse for its delay in seeking to amend" its answer to add an affirmative defense based on its

own negligence. (*Id.* at pp. 691-692.) Instead, defendant made the "conscious strategic decision" to wait to amend until plaintiffs had waived their ability to assert a professional negligence claim against defendant; this "was legal gamesmanship in its purest sense." (*Id.* at p. 693.) By contrast, Sargon waited to amend because of delicate settlement negotiations and its delayed motion did not put USC in the position of having waived any rights or defenses.

The only gamesmanship that appears from this record is that of USC's. It is understandable that a university like USC that has been entrusted with billions in donations to fund legitimate and competently-performed research would like to avoid facing the serious charges that instead it tampered with study records and accepted virtual bribes from Sargon's main competitors. But it is "unreasonable to deny a party the right to amend where the only apparent hardship to the defendants is that they will have to defend." (*Landis v. Superior Court* (1965) 232 Cal.App.2d 548, 557.)

IV. SARGON'S COSTS WERE REASONABLE AND SHOULD NOT HAVE BEEN STRUCK OR APPORTIONED.

The trial court erred in slashing Sargon's costs by over 50%, some $24,000. First, the court improperly apportioned the costs to already-dismissed individual defendants and second, it mistakenly struck two claimed costs as unreasonable. Those errors brought Sargon's total recovery to $499,156.08, just $1,843.92 below USC's section 998 offer, which enabled the trial court to compel Sargon also to pay some $51,000 of USC's costs.

A. Apportionment Was Improper.

As to apportionment, USC has tellingly abandoned its reliance on *Slavin v. Fink* (1994) 25 Cal.App.4th 722, even though that was the only authority cited by the trial court. (VII AA 1756.) USC's retrenchment is sensible, because in *Slavin*, after plaintiff had only won against one defendant, the prevailing defendant sought costs incurred on behalf of all defendants. (*Slavin v. Fink, supra,* 25 Cal.App.4th at p. 724.) Apportionment was proper there because one of the parties seeking costs had not prevailed. (*Id.* at p. 726.) Here, however Sargon prevailed both as a plaintiff and as a cross-defendant and USC did not prevail at all, so *Slavin* did not apply.

Given this trial outcome, the trial court had no discretion to apportion Sargon's costs. In construing the costs statute (Code of Civil Procedure section 1032), courts have held that "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, emphasis added.) 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, emphasis added; 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"].)

USC now argues that Sargon was somehow estopped from opposing apportionment, because the trial court had earlier granted costs apportionment to Sargon when it granted summary judgment to the individual defendants. (RB 52-53.) But that situation was entirely

different. It exactly mirrored *Slavin*, where apportionment was proper, because only some defendants prevailed and thus the prevailing defendants could not recover costs incurred by the non-prevailing defendants. Here, USC neither prevailed as a defendant nor as a cross-complainant.

Apparently sensing the weakness of its position, USC also claims the trial court's apportionment ruling was proper because it was based on the apportioned deposition costs being found unreasonable. (RB 53.) But the trial court didn't do that. Its decision to strike $12,250.50 in deposition costs was based solely on an apportionment theory. (VII AA 1755[¶3d], 1756[*1].)

B. Dr. Abou Rass's First-Class Airfare Was A Reasonable Cost.

The trial court also axed $5,400 of Sargon's costs, representing the difference between a first-class and a coach airfare for Dr. Abou Rass to fly from Saudi Arabia for his deposition. USC does not dispute that section 1033.5 allows recovery for "travel expenses to attend depositions." (Code Civ. Proc., § 1033.5, subd. (a)(3).) The only remaining issue is whether the first-class airfare was reasonable. Given the circumstances here, the trial court abused its discretion in declaring the airfare cost unreasonable.

Dr. Abou Rass was a USC employee, and thus USC had an obligation to make him available for deposition. (Code Civ. Proc., § 2025, subds. (e)(2) & (j)(3).) Dr. Abou Rass maintained he needed to fly first class on the long flight from Saudi Arabia because of a medical condition.[5]

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[5] Contrary to USC's misconstruction of the trial court's comments (RB 25), the court never determined whether it was medically necessary for Dr. Abou Rass to fly first class.

(VI AA 1364-1393; Fees RT 5:26-6:7.) In addition, the parties had reached various agreements on sharing Dr. Abou Rass' travel costs.[6] Sargon claims USC reneged on its promises, and USC claims it was Sargon that did not honor its promises.[7] Regardless of who bears blame, it was Sargon that ended up paying 100% of the costs. It is an abuse of discretion to force Sargon to bear all the costs of paying a USC employee's medically-necessary first-class airfare to attend his deposition, particularly when USC had repeatedly agreed to pay for some, if not all, of that airfare.

C. The $5,000 Cost For The Video Of The Monte Carlo Symposium Was Also Reasonable.

Finally, the trial court struck the $5,000 cost of obtaining a video of the critical USC Monte Carlo Symposium. (VII AA 1691:10-12, 1755; Fees RT 5:10-16.) The reason Sargon bought the video was because what was said and what happened at the Monte Carlo Symposium was important evidence in the case. Since the costs of obtaining videotaped evidence are neither specifically enumerated or proscribed in section 1033.5, they "may be allowed or denied in the court's discretion." (Code Civ. Proc., § 1033.5, subd. (c)(4); accord *Science Applications Internat. Corp. v. Superior Court* (1995) 39 Cal.App.4th 1095, 1103.) USC does not dispute that the costs of obtaining potential evidence are recoverable, but instead posits various procedural contentions. (RB 55-56.) Thus, the only substantive question

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[6] In fact, on both July 29 and August 3, 1999, USC's counsel wrote that "USC stands by its agreement to pay Dr. Abou-Rass' airfare to return from Saudi Arabia for a deposition." (VI AA 1367, 1377.)

[7] As the trial court noted at the costs hearing, "it's not clear to me if [the agreements] happened or not." (Fees RT 41:6-7.)

that remains is whether the evidence was relevant and the costs reasonable. The answer to both of those questions is "yes."

And even USC's procedural arguments go nowhere. Relying on a concurring opinion in a court of appeal decision, USC argues that because Sargon is raising this statutory basis for recovery of the video costs for the first time on appeal, this Court should reject the argument. (RB 55.) But the facts concerning this video are undisputed, and the basis to recover litigation costs is a purely legal issue; appellate courts can hear issues for the first time on appeal "where the issue raised a pure question of law . . . ." (*Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 998-999, disapproved on another ground in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644.) And interestingly, in the main opinion of the case USC relies upon, the court held that mediation expenses—which also are not mentioned in section 1033.5—could be recovered by a prevailing plaintiff. (*Gibson v. Bobroff* (1996) 49 Cal.App.4th 1202, 1207-1210.) The costs of obtaining an important piece of evidence should be treated no differently.

And indeed, USC has changed its tune on appeal as well. In the trial court, USC argued that the trial court should disallow the video costs because they are an unrecoverable "investigation expense." (VII AA 1691:8-10, citing Code Civ. Proc., § 1033.5, subd. (b)(2).) USC has dropped that argument on appeal and instead now argues that the video was improperly listed as a deposition cost on Sargon's memorandum of costs. (RB 55.) Sargon listed the video under the name of Dr. Andre Rihan, because that is from whom Sargon obtained it. (V AA 1287, 1331[fn. 4].) USC also fails to mention that the only reason Sargon had to buy the video from Dr. Rihan was because USC refused to produce it in discovery. (V AA 1331[fn. 4].)

Because the video was direct evidence relevant to the issues in this lawsuit, Sargon was entitled to reimbursement of its reasonable cost, and the trial court plainly abused its discretion in failing to award it, particularly since USC blocked Sargon's attempt to obtain the video in discovery.

If this Court reverses any of the trial court's rulings on Sargon's costs, Sargon's net recovery will rise above USC's $501,000 section 998 offer, and therefore this Court must also reverse USC's cost award of $50,977.72. (See VII AA 1760.)

V. THE TRIAL COURT'S ATTORNEYS' FEES RULING WAS STARTLINGLY WRONG.

At trial Sargon won almost a half-million dollars on its only claim, breach of contract. Sargon also defeated all of the claims in USC's cross-complaint, including breach of contract. An "unqualified win," by any measure. Nevertheless, in a counterintuitive turn of events, the trial court denominated USC, rather than Sargon, as the prevailing party and awarded USC $700,000 in attorneys' fees. USC's attempts to justify that startling decision all fail.

A. The Governing Standard Of Review Is De Novo, Not An Abuse Of Discretion.

USC first contends that the trial court's ruling should be reviewed for abuse of discretion. (RB 56.) Not quite. The issue here was whether there was any legal basis for the trial court to award attorneys' fees to USC as the "prevailing party" under section 1717. And the courts have unequivocally held that 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.) The abuse-of-discretion cases cited by USC did not involve the legal basis for awarding fees, but rather concerned apportionment of fees or the amount of the fees.[8] (RB 56-57.) The questions of whether the amount of fees are excessive or should be apportioned inherently invoke the trial court's discretion; the legal question of who is the prevailing party does not.

And even if the abuse of discretion standard were to apply, our Supreme Court ruled that 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"—the "trial court ha[s] no discretion to deny the [plaintiff its] attorneys fees under section 1717." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876.)

B. Not Surprisingly, USC Has Not Found A Case Where A Defendant That Lost $500,000 On The Plaintiff's Breach Of Contract Complaint And Lost Its Own Breach Of Contract Cross-Complaint Was Nevertheless Named The Prevailing Party.

USC's next tack is to try to substantively defend the trial court's ruling. In doing so, it continues with its pattern of abandoning its main

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[8] See *Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 404 [amount of fees is "within the sound discretion of the trial court"]; *Korech v. Hornwood* (1997) 58 Cal.App.4th 1412, 1422-1423 [apportionment of fees to non-contract claims]; *Mustachio v. Great Western Bank* (1996) 48 Cal.App.4th 1145, 1150-1151 [apportionment].

authorities below. In the trial court, USC placed primary reliance on two cases: *Acree v. General Motors Acceptance Corp., supra,* 92 Cal.App.4th 385 and *Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136. (V AA 1216-1218.) On appeal, those cases have disappeared.

Nor has USC cited any new authority that holds that a plaintiff that wins a half-million dollars on its breach of contract claim and defeats the contract claim in the cross-complaint is not the prevailing party; rather the losing defendant and cross-complainant is. (RB 57-60.) It is not surprising that USC has not found such authority, because none exists.

As our Supreme Court noted, section 1717's use of the words "shall be entitled" means "that a party prevailing on a contract receive attorney fees *as a matter of right.*" (*Hsu v. Abbara, supra*, 9 Cal.4th at p. 872, quoting Civ. Code, § 1717, subd. (a).) Thus, the courts have found both plaintiffs and defendants who prevail on a contract claim to be the prevailing party. (*Texas Commerce Bank v. Garamendi* (1994) 28 Cal.App.4th 1234, 1247 [plaintiff]; *Hsu v. Abbara, supra*, 9 Cal.4th at pp. 876-877 [defendant]; *Carole Ring & Associates v. Nicastro* (2001) 87 Cal.App.4th 253, 261 [defendant].) Likewise, a cross-defendant who wins on a contract cross-complaint is a prevailing party. (*Berge v. International Harvester, supra,* 142 Cal.App.3d at p. 164.) Since Sargon fit into both of those categories, it obtained an "unqualified win" and should have been named the prevailing party. (See *Hsu v. Abbara, supra*, 9 Cal.4th at pp. 876-877.)

C. Just Because Sargon Did Not Recover Every Dollar It Sought In Compensatory Damages Does Not Make USC The Prevailing Party.

USC also argues that Sargon only recovered some $430,000 of the $800,000 it sought in compensatory damages, and thus did not prevail. (RB 60.) But 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; see also *Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109 [plaintiff prevailing party under section 1717 even though only recovered $440,000 after seeking $2 million at trial]; *Sukut-Coulson, Inc. v. Allied Canon Co.* (1978) 85 Cal.App.3d 648, 656; *Trustees of Cent. States, Southeast & Southwest Areas Pension Fund v. Golden Nugget, Inc.* (C.D.Cal. 1988) 697 F.Supp. 1538, 1554.) Similarly, the fact that Sargon did not recover every dollar of compensatory damages it sought does not make USC the prevailing party. Tellingly, USC resorts to importing its own percentage statistics into several section 1717 cases (RB 60), even though none of these cases even noted the percentages, let alone used the percentage of recovery as a basis for its decision.

D. USC Cannot Justify The Trial Court's Distortion Of The "Litigation Objective" Concept To Recast USC As The Victor.

USC's final salvo is to try to justify the trial court's distortion of the concept of litigation objectives. (RB 59-60.) The trial court's elevation of the so-called "litigation objective" to a touchstone for determining a prevailing party finds no support in section 1717 or the case law interpreting it. (See AOB 52-57.) Even so, the court's analysis of litigation

objective was wrong. The court's fees order does not define Sargon's supposed litigation objective. (VII AA 1756.) USC quotes a comment by the court at the fees motion hearing that Sargon's litigation objective was to obtain lost profits damages of "40 million or 100 million or 300 million [dollars]." (RB 59.) Of those figures, the only one that even the trial court acknowledged had any evidentiary support was $40 million, because that was the amount prayed for in Sargon's complaint. (Fees RT 65:3-4.) Nevertheless, USC repeatedly cites $300 million as the touchstone damages figure. (RB 3, 12, 27, 28, 29, 35, 41, 42, 50, 63.)

But using a prayer in an unverified complaint to define "litigation objective" for purposes of section 1717 fees is completely arbitrary and convoluted. Neither the trial court nor USC point to any factual evidence or testimony that recovering $40 million was Sargon's litigation objective. Instead, Dr. Lazarof testified that Sargon's initial objective in suing USC was to obtain access to the study patient records that Dr. Chee had refused to make available, even though the Agreement granted Sargon absolute access. (VI RT 1324:2-26; I AA 88[¶4.2].) Since as a result of the suit Sargon did get the records, are we to say that Sargon achieved its litigation objective? And under USC and the trial court's analysis then, if Sargon had lost its breach of contract claims but obtained the records, it should still be the prevailing party for attorneys' fees. This makes no sense.

In its order the trial court also did not explicitly define USC's litigation objective, but in its comments at the hearing it stated that USC's $501,000 section 998 offer defined its litigation objective. (Compare VII AA 1756 with Fees RT 65:16-17.) That definition was equally arbitrary. If the trial court used Sargon's complaint to define its litigation objective, why not use the answer and cross-complaint filed by USC? USC's answer admitted no allegations, contained 19 affirmative defenses

and prayed that Sargon "take nothing by reason of its Complaint." (I AA 21-26.) In its cross-complaint USC brought 11 claims, and prayed for "[c]ompensatory damages, together with interest as provided by law and, as appropriate, damage multiples, according to proof at trial." (I AA 29-46.) These pleadings indicate that USC's litigation objective was to obtain a defense verdict and damages on its cross-complaint. It got neither.

Indeed, no matter how one views "litigation objective," Sargon unqualifiedly won on USC's cross-complaint and must be awarded the attorneys' fees it incurred defending the cross-complaint.

The manipulative artificiality of the trial court's view of so-called "litigation objectives" is illustrated by the outcome here: The trial court arbitrarily defined Sargon's litigation objective as lost profits, issued an erroneous evidentiary ruling to make it impossible for Sargon to recover those lost profits, and then when Sargon won at trial, ruled that Sargon didn't accomplish its litigation objective.[9] Such a distortion of litigation objective has been rejected in a case cited by USC, *Mustachio v. Great Western Bank, supra,* 48 Cal.App.4th 1145. There, 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.) Likewise, simply because one type of Sargon's potential damages were taken off the table by the court before trial does not mean that Sargon did not accomplish its litigation objective and was not the party prevailing on the contract.

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[9] Indeed, it appears that, right after the jury rendered its verdict, the trial court was already contemplating how USC could be designated the prevailing party. While ruling on USC's motion to stay entry of judgment, the court stated: "[I]n theory, it could be at this moment positive 400 plus thousand dollars for the plaintiff. And in theory, after the attorneys fees motions, it could be minus some amount of money for the plaintiff." (X RT 2534:15-18.)

This Court should reverse the trial court's ruling with directions to find Sargon the prevailing party and award it the attorneys' fees it sought.[10]

E. USC Did Not Present Sufficient Evidence To Support Its $700,000 Fee Award.

And it is apparent that even USC never expected the trial court to find *it* the prevailing party and award *it* attorneys' fees, because it submitted almost no evidence to support its fee request. What USC terms a "comprehensive declaration" consisted of a one-sentence, general description of what tasks only the junior lawyer performed in the case (V AA 1224-1225[¶8]), a one-paragraph description of all four USC lawyer's expertise that simply lists their years of practice and law school (V AA 1225[¶10]), and a summary chart that only shows total hours spent and hourly rate for each lawyer (V AA 1227). (See RB 61.) USC's attorneys submitted no bills, invoices, cancelled checks or detailed breakdown of the work they performed, or how much of their time related to their defense of USC versus the individual defendants. (V AA 1223-1228.) By contrast, Sargon included over 400 pages of detailed invoices covering all of the litigation. (III AA 728-730; III AA 758-V AA 1169.) Despite this lack of evidence, the trial court nevertheless awarded USC $700,000 in attorneys' fees. (Fees RT 66:13-25; VII AA 1756.)

USC now claims that this paltry evidence was "more than sufficient," relying on *Steiny & Co. v. California Electric Supply Co.* (2000) 79 Cal.App.4th 285 and *Martino v. Denevi* (1986) 182 Cal.App.3d 553. (RB 62.) But in *Steiny & Co.*, although the attorney had not supplied

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[10] As USC acknowledges, Sargon's fees amounted to a little over $1.5 million. (RB 28.)

billing statements, he had "included detailed evidence of hours spent, tasks concluded, and billing rates," which was enough to support the fee award. (*Steiny & Co. v. California Electric Supply, supra,* 79 Cal.App.4th at p. 293.) USC, on the other hand, had no "detailed evidence"; the conclusory declaration only generally described the tasks of one of the four attorneys, listed only total hours, and did not link the hours spent to any specific tasks. (V AA 1224-1227; see *Asbestos Claims Facility v. Berry & Berry* (1990) 219 Cal.App.3d 9, 24 ["conclusory factual assertions concerning services performed are inadequate to justify an award of such fees"].)

And in *Martino*, a fee award was actually reversed because the evidence omitted "crucial information" such as the "type of issues dealt with and appearances made on the clients' behalf," and because no "attempt [was] made to explain, in more than general terms, the extent of services rendered to the client." (*Martino v. Denevi, supra,* 182 Cal.App.3d at pp. 559-560.) In reversing a fee award of only $40,000, the court ruled that "the trial court [was] placed in the position of simply guessing at the actual value of the attorney's services. That practice is unacceptable and cannot be the basis for an award of fees." (*Id.* at pp. 558, 559.) Here, the award was $700,000, and the paucity of information provided by USC put the trial court "in the position of simply guessing at the actual value of the attorneys' services." In fact, although USC sought almost $1.5 million in fees (V AA 1227), the trial court arbitrarily awarded $700,000. (VII AA 1756.) The trial court's ruling is "unacceptable," even under the authority relied upon by USC.

CONCLUSION

This Court should vindicate Sargon's dogged pursuit of a hearing: A jury should finally be able to hear Sargon's lost profits evidence and its newly-discovered tort claims. This Court should reverse the trial court's orders granting USC's motion in limine and denying leave to amend and remand with directions to hold a trial limited to Sargon's newly-discovered tort claims and a determination of what are Sargon's reasonably foreseeable lost profits damages.

The trial court's startling attorneys' fees and costs orders must also be reversed. This Court should remand with directions to (1) award Sargon the additional costs of $22,650.50 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.

Dated: December 13, 2004

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.

CERTIFICATION

Pursuant to California Rules of Court, Rule 14(c), I certify that this Appellant's Reply Brief contains 11,157 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: December 13, 2004

/Jens B. Koepke