S191550

IN THE

SUPREME COURT OF CALIFORNIA

SARGON ENTERPRISES, INC.,
Respondent,

vs.

UNIVERSITY OF SOUTHERN CALIFORNIA, et al.
Petitioner.

SUPREME COURT
FILED

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Deputy

After a Decision by the Court of Appeal
Second Appellate District, Division One
Case Nos. B202789 & B205034
(Los Angeles Superior Court Case No. BC209992 (related to No. BC263701))

ANSWER TO PETITION FOR REVIEW

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PRELIMINARY STATEMENT

Petitioner the University of Southern California ("USC") for the second time seeks review of an unpublished appellate opinion holding merely that Respondent Sargon Enterprises, Inc. ("Sargon") is entitled to seek lost profits as part of its damages on an already-adjudicated breach of contract claim.[1]

No aspect of the recent February 9, 2011 opinion is appropriate for review. USC's attempt to import a supposed "conflict" it has teased from reported decisions that deal not with the calculation of lost profit damages, but with scientific testimony regarding medical causation, is unavailing. The unpublished opinion here is of significance only to Sargon and USC and falls squarely within the mainstream of well-settled *lost profits* jurisprudence.

USC's Petition begins with a classic "straw person," positing the "Issue Presented" as: "Does *Evidence Code* section 801(b) permit a trial

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[1] The opinion that prompted USC's March 18, 2011 Petition is the *second* opinion in which the Court of Appeal reversed the exclusion of expert testimony regarding the profits lost by Sargon when USC breached the parties' contract. The trial court previously excluded this evidence on the ground that lost profits were not "foreseeable." (Opinion, 2.) The Court of Appeal reversed and remanded for a "new trial." (*Sargon Enters., Inc. v. University of Southern California* (Feb. 25, 2005, 2d Civ. Case No. B167519) 2005 WL 435413, *5. ("*Sargon I*").) USC's Petition for Review of *Sargon I* was denied on June 8, 2005. (See Supreme Court Case No. S132871.) This Petition challenges the reversal by the Court of Appeal of the trial court's post-remand decision to *again* exclude the lost profits testimony, this time as "speculative."

court to review the basis of an opinion by an expert witness and to exclude that opinion if it is based on a speculative or unreliable methodology that is incapable of assisting the jury?"

The answer to a question so phrased is "of course." Sargon has never disputed that a trial court may "review the basis of an opinion by an expert witness" and "exclude that opinion if it is based on a speculative or unreliable methodology that is incapable of assisting the jury."

Nor did the Court of Appeal even hint otherwise in its February 9, 2011 unpublished decision. Rather, that decision found only that the trial court in this case erred in excluding lost profits testimony from a highly qualified and experienced accountant and valuation expert,[2] where that testimony was based on recognized methods of calculating lost profits *and* was supported by substantial market research from indisputably authoritative sources, as well as interviews and testimony from persons

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[2] Mr. Skorheim has been a CPA for 25 years, having worked at Deloitte & Touche (one of the "Big Four") and Moss Adams (the tenth largest CPA firm in the world). He is a Certified Valuation Analyst, Certified Fraud Examiner, Certified Forensic Accountant, and attorney who specializes in forensic accounting, business industry analysis, and economic damages analysis. His work over the past 25 years has spanned all major industries, including real estate, manufacturing, distribution, financial services, and health care, and involved both public and private companies. He has testified many times on business valuation and lost profits, including in the dental implant field, and has been a court-appointed expert on accounting and valuation issues. (4 RT J12:5-J17:24; 13 AA 3238-3247; 43 AA 11059:5-20.) Mr. Skorheim has testified as an expert in court more than 25 times over the past ten years and no other court has excluded his testimony based on criticism of his methodology or the appropriateness of his analyses. (4 RT J19:14-J20:2.)

who themselves qualified as experts based on long careers in the relevant market (dental implants).[3] That decision is consistent with decades of published case law.

The Court of Appeal here did not purport to impose new restrictions on the "gatekeeping" function of the trial courts. Instead, based upon the specific circumstances of this case, it held only that the trial court had erred (again) in concluding that the specific lost profits analysis in question here was unduly speculative and unreliable and would not assist the jury. As its unpublished opinion merely applies existing law and, by definition, can create no conflict with any published opinion, there is no need or basis for review by this Court.

USC's "sky is falling," parade of horribles argument, in which it invokes the specter of a massive award that could potentially "devastate" its endowment and hamper its educational mission (Petition, 5), likewise

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[3] Sargon in this Answer will ignore most of the misstatements made by USC concerning the lost profits analysis performed by Mr. Skorheim and instead simply note that they are many in number. One obvious example is the assertion (adopted by the trial court) that Mr. Skorheim merely repeated what he had "read in the lay press." (Petition, 11.) In fact, Mr. Skorheim's analysis was based upon, among other things, market analyses prepared by the Millennium Research Group, an organization that performs market research in the medical products and science and technology areas and publishes data relied upon both by damages experts like Mr. Skorheim and industry participants, including dental implant companies, in developing their marketing and business plans. (4 RT J24:14-19; 5 RT K38:5-25; 7 RT 358:1-8.)

provides no ground for review. Leaving aside that harm to USC (even "devastating" harm) is not a ground for review under California Rule of Court 8.500(b), the Court of Appeal merely reversed the pre-trial exclusion of expert testimony and remanded for an as-yet-to-be-held lost profits trial.[5]

The jury may reject the expert's lost profits testimony, and award Sargon no damages. Or it may award damages below or at the low end of the spectrum calculated by Mr. Skorheim, whose lost profits projections start, not at the $1.2 billion repeatedly emphasized by USC, but at $120,011,000 for the period 1998 through 2009 (the date trial was to have occurred). (Opinion, 25.) Even had USC identified an issue appropriate for review (it has not), review now would be premature, at best.

For these reasons, review should be denied and the matter should proceed to trial.

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[5] If USC in fact were so concerned about the harm it might suffer from a lost profits award, perhaps it should have considered that potential harm before deciding to "sabotage[] the clinical study of the Sargon implant" it had agreed to conduct (Opinion, 30) and thereby cause Sargon to lose profits that the Court of Appeal has now found can properly be considered both clearly foreseeable (*Sargon I*) and "proved ... with reasonable certainty" (Opinion, 2).

ARGUMENT

I. No Statutory Ground For Review Exists.

Rule 8.500 of the California Rules of Court specifies only limited grounds for review by this Court. Though USC fails to identify the specific prong of Rule 8.500 under which it seeks review, it appears to argue that review is "necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).) It is not.

A. USC's Petition Is Undermined By The Consistency of Published Case Law Cited In The Unpublished Opinion Below.

USC concedes that the two published decisions addressed below by the Court of Appeal – *Parlour Enterprises, Inc. v. Kirin Group, Inc.* (2007) 152 Cal.App.4th 281, and *Palm Medical Group, Inc. v. State Compensation Ins. Fund* (2008) 161 Cal.App.4th 206 – are *consistent* in their legal analysis, and merely reached different results by applying that *shared* legal analysis to differing facts. (Petition, 28 ["[i]n other words, *Palm Medical Group* rested on the same approach that *Parlour Enterprises* found lacking: the expert calculated lost profits by comparing similarly sized businesses engaged in similar activities"].)[6]

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[6] The majority found no inconsistency between the two decisions. It held only that Mr. Skorheim's analysis was more like that of the expert in

USC is thus relegated to arguing, here, that the unpublished opinion "conflicts with Evidence Code section 801(b)" (Petition, at 13) and "with other Court of Appeal decisions concerning expert testimony on lost profits" (*id.*, at 24). This contention is not only inaccurate (see Section I.C, *infra*), but presents no cognizable basis for review. Rather, USC's true complaint appears to be that the Court of Appeal, in an unpublished decision having no precedential value, got it wrong. Simply stated, even were there substantive merit to USC's contention that a single unpublished decision contravened published case law, that contention would fail to present an appropriate ground for review by this Court.

B. **This Case Is Not The Proper Vehicle To Resolve A Purported Conflict Among Cases Addressing The Admissibility Of Medical Testimony On Causation.**

Apparently recognizing that the uniformity of decisional law relating to expert testimony on lost profits undermines its plea for review under Rule 8.500(b), USC seeks to tease a conflict, any conflict, from the published case law. It settles on a conflict that it claims exists between a couple of cases it cited in passing in the court below and a case cited by

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Palm Medical than that of the expert in *Parlour Enterprises*. (Opinion, 30.) Nor did the dissent find any conflict between the two cases. It argued only that whether Mr. Skorheim's testimony was closer to the testimony found admissible in *Palm Medical* or the testimony excluded in *Parlour Enterprises* was a question for the trial court. (Dissenting Opn., 6-7.)

neither of the parties *nor* by the majority or the dissent in the Court of Appeal – *Roberti v. Andy's Termite & Pest Control* (2004) 113 Cal.App.4th 893. (Petition, at 18-22.)[7] Even assuming the existence of such a conflict, this case is not a proper vehicle to resolve any such "conflict" that is at best tangential to the Court of Appeal decision.

That USC has had to stretch mightily to "borrow" a claimed split of authority from an unrelated area of law is demonstrated by the fact that none of the cases it claims are in conflict is even mentioned, let alone discussed, by *either* the majority opinion *or* the dissenting opinion in the court below. Certainly, neither the majority nor the dissent recognized or commented upon the conflict that USC claims to exist. Likewise, neither found it necessary to ally itself with one or the other of the two supposedly conflicting lines of cases to reach its conclusion.

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[7] USC thus identifies a supposed conflict between *Roberti v. Andy's Termite & Pest Control* (2004) 113 Cal.App.4th 893, and three cases only briefly noted in its brief below: *In re Lockheed Litigation Cases* (2002) 115 Cal.App.4th 558, *Dee v. PCS Property Mgm't, Inc.* (2009) 174 Cal.App.4th 390, and *Westrec Marina Mgm't, Inc. v. Jardine Ins. Brokers Orange County, Inc.* (2000) 85 Cal.App.4th 1042. To that list, USC now adds *Smith v. ACandS, Inc.* (1994) 31 Cal.App.4th 77, 92-93, a case not cited below. (Petition, 18-22.) It also references a subsequent opinion from the *Lockheed* litigation – *In re Lockheed Litigation Cases* (2005) 23 Cal.Rptr.3d 762. That decision was vacated, however, by this Court's grant of review, rendering the opinion not citeable (Cal. Rules of Court, rule 8.1115), of no precedential effect, and of no assistance to USC in seeking to establish the existence of a conflict among published decisions of the Court of Appeal.

This is not surprising because, with one exception, these cases dealt, not with expert testimony on lost profits (or damages of any kind), but testimony by medical experts seeking to establish causal links between exposure to certain substances and illnesses suffered by the plaintiffs. (*In re Lockheed Litigation cases, supra*, 115 Cal.App.4th at pp. 564-565; *Dee v. PSC Property Mgm't, supra*, 174 Cal.App.4th at p. 405; *Smith v. ACandS, Inc., supra*, 31 Cal.App.4th at pp. 92-93; *Roberti v. Andy's Termite & Pest Control, supra*, 113 Cal.App.4th at pp. 897-898.)[8] As this case does not involve this issue, or such testimony, it is not the proper vehicle to resolve any supposed conflict raised by these decisions.

C. <u>The Opinion Is Consistent With Established Law.</u>

There is no conflict in the reported cases concerning the trial court's ability to review and exclude an expert's *lost profits* testimony. The majority's conclusion – i.e. that USC's criticisms of Sargon's specific assumptions and methodology are properly left to the jury – instead glides comfortably down the mainstream of reported case law.

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[8] The lone exception – *Westrec Marina Mgm't v. Jardine Ins. Brokers, supra*, 85 Cal.App.4th 1042 – in fact has nothing to do with the remaining cases identified by USC. It mentions neither the case with which USC suggests it conflicts (*Roberti*) nor any of the other cases with which it is lumped by USC. Nor is *Westrec* inconsistent with the majority opinion here and, even if it were, this would not justify review for the reasons stated in Section I.A, *supra*.

For example, in affirming a *lost profits* award against a similar challenge that an expert's projections were unduly speculative, *Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 347 held: "Technical arguments about the meaning and effect of expert testimony on the issue of damages are best directed to the jury."

Brandon & Tibbs v. George Kevorkian Accountancy Corp. (1990) 226 Cal.App.3d 442, 469, likewise rejected a challenge to another expert's *lost profits* methodology, stating: "the method of calculation selected by Mr. Gnagy simply goes to the weight to be given Mr. Gnagy's expert opinion evidence. It is for the trier of fact to accept or reject this evidence . . . ."

Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co. (1996) 47 Cal.App.4th 464, 489-90, concurs: "As to the reasonableness of the assumptions underlying the experts' *lost profit* analysis, criticisms of an expert's method of calculation is a matter for the jury's consideration in weighing that evidence." (Italics added.)

Similarly, *People ex rel. Dep't of Transp. v. Clauser/Wells Partnership* (2002) 95 Cal.App.4th 1066, 1083, reversed the trial court's exclusion, after a 402 hearing, of expert testimony on the value of salvage auto parts. The Court of Appeal again held that the appropriateness of the particular methodology chosen by the expert to value a particular business is "a factual question for the jury." (See also *Douglas v. Ostermeier* (1991)

1 Cal.App.4th 729, 739 [assertion that real estate expert's opinion as to property value "was not substantiated by solid documentary evidence is a challenge not to the admissibility of [the expert's] testimony but rather to the weight to be given her opinion"].)[9]

The majority's holding that it is for the jury to determine the validity of Mr. Skorheim's analysis and projections is consistent with this case law, particularly given that Mr. Skorheim used traditional and long-recognized methods to project Sargon's lost profits. He did not, as USC misleadingly asserts, use a methodology he "invented" for this case. (Petition, 3.) (The only thing "invented" is USC's claim that Mr. Skorheim used an unprecedented approach.) Mr. Skorheim confirmed that the methodology used here is "consistent with the methodology" he has used in other cases and typically is used in cases, like this one, in which one seeks to determine the success that a plaintiff would have attained had it not been for a defendant's wrongful conduct. (4 RT J19:14-J20:11, J27:12-21.)

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[9] Cases from other contexts are in accord. (E.g., *Ventura County Flood Control Dist. v. Security First Nat'l Bank* (1971) 15 Cal.App.3d 996, 1003 [trial court "determines the competency and qualification of an expert witness, and the trier of fact is the exclusive judge of the weight to be given to expert testimony"]; *People v. Fulcher* (2006) 136 Cal.App.4th 41, 54 ["erroneous factual assumptions by the experts could be addressed through cross-examination of the experts and by showing there was no evidence to support their conclusions. Defendant's objection to the experts' opinion testimony goes to weight, not the admissibility of their testimony."]; *People v. Brekke* (1967) 250 Cal.App.2d 651, 661-662 [objections to extent of an expert's investigation and sufficiency of basis of his opinion go "not to admissibility but to the weight of his testimony"].)

The majority opinion correctly recognized that Mr. Skorheim's methodology, being based upon, *inter alia*, Sargon's historical performance and the performance of companies identified as comparable to Sargon, is consistent with mainstream lost profits analysis. (Opinion, 21, 30.) Extrapolation based on past performance and comparisons to comparable companies, of course, are both recognized methods of calculating lost profits. (E.g., *Parlour Enters., Inc. v. Kirin Group, Inc.* (2007) 152 Cal.App.4th 281, 288 [lost profit projections may be based upon "market surveys and analyses," the "experience of similar businesses," the "plaintiff's experience in the same business," or "prelitigation projections"].)

Because there is no inconsistency among published opinions on these issues, and the Court of Appeal opinion implicates no important issue of law requiring resolution by this Court, there is no ground for review.

II. Review At This Pre-trial Stage Is Unnecessary And, At Best, Premature.

Even had USC established a proper statutory ground for review (it has not), review is not necessary at this stage of the proceedings. The unpublished opinion of the Court of Appeal simply reversed the trial court's *pre-trial* exclusion of expert testimony on lost profits. No lost profits award has yet been made.

While Sargon believes that it will be awarded lost profits, the jury may well disagree. Or, it may elect to award lost profits at the low end of Mr. Skorheim's calculations, or in an amount less than projected even by Mr. Skorheim's most conservative scenario.

This is precisely what occurred in *Palm Medical Group*, *supra*, 161 Cal.App.4th 206. There, as here, the expert projected a range of profits based on plaintiff's past performance and a comparison to other companies in the field. The Court of Appeal rejected defendant's claims that the expert's testimony was speculative and based on a flawed methodology, and that the expert had selected comparison companies that were not comparable. In so doing, it concluded that the jury apparently took defendant's criticisms into account by awarding lost profits totaling less than half the expert's most "'conservative' estimate" of $2.6 million. (*Id.*, at 228.)

Moreover, while USC raises the bogeyman of a potential billion dollar judgment that could "devastate" its endowment, USC would have the option of posting a bond pending appeal. Review at this pre-trial stage therefore is not necessary to protect USC (or other defendants liable for similar wrongdoing) from being forced to agree to supposedly "extortionate settlements" by fear of so-called "bet-the company" or "bet-the-university" damage awards. (Petition, 5.)

By contrast, granting review will substantially prejudice Sargon. It now is more than **13 years** from the date of USC's breach of contract, and **eight years** since the jury's finding of breach.[10] Yet USC, employing battalions of lawyers and a "no motion left unfiled" approach, has managed for more than a decade to avoid being called upon to pay for the full extent of the harm it caused, having now twice induced trial judges to erroneously exclude evidence of Sargon's lost profits.

This truly is a case in which "justice delayed is justice denied." Sargon is entitled to have its day in court, no matter how much USC may wish otherwise. This Court should permit a jury to assess lost profits, as the Court of Appeal now *twice* has said should occur.

CONCLUSION

The unpublished opinion of the Court of Appeal is of significance to two parties only – USC and Sargon. Review is not necessary either to secure uniformity of law or to settle an important issue of law. The majority opinion below fits comfortably within the mainstream of reported decisions regarding the admissibility of expert testimony in general, and on the issue of lost profits specifically. That USC zealously seeks to avoid

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[10] USC breached the parties' contract even before **February 1998**, when the first study report was due (but improperly withheld by USC). (1 AA 214-215, 224.) The jury verdict confirming USC's breach was issued in **March 2003**. (1 AA 194-197.)

having to answer for the full extent of the harm caused by its long-ago adjudicated breach of contract is not a proper ground for review.

Dated: April 5, 2011

Respectfully submitted,

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rules 8.504(d)(1))

The text of this petition is proportionately spaced, has a typeface of 13 points or more and contains 3,342 words, including footnotes, as counted by the computer program used to generate the petition.

Dated: April 5, 2011

Respectfully submitted,

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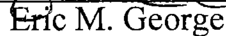

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 2121 Avenue of the Stars, Los Angeles, CA 90067.

On April 5, 2011, I served the foregoing document described as: **ANSWER TO PETITION FOR REVIEW** on the parties in this action by serving:

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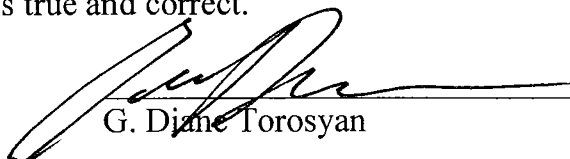

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