Filed 2/9/11 Sargon Enterprises v. USC CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SARGON ENTERPRISES, INC., Plaintiff and Appellant, v. UNIVERSITY OF SOUTHERN CALIFORNIA et al., Defendants and Appellants.	B202789, B205034 (Los Angeles County Super. Ct. No. BC209992)

APPEALS from a judgment and orders of the Superior Court of Los Angeles County. Terry A. Green, Judge. Judgment reversed with directions; orders affirmed.

Browne Woods George, Allan Browne, Eric M. George, Benjamin D. Scheibe, Robert B. Broadbelt and Ira Bibbero for Plaintiff and Appellant.

Quinn Emanuel Urquhart Oliver & Hedges, Quinn Emanuel Urquhart & Sullivan, John B. Quinn, Michael E. Williams, Michael T. Lifrak, Kathleen M. Sullivan and Daniel H. Bromberg for Defendants and Appellants.

The University of Southern California (USC) breached its contract with Sargon Enterprises, Inc. (Sargon), yet convinced the trial court for the second time to exclude evidence of lost profits on the ground it was speculative. We conclude the trial court erred by excluding Sargon's evidence in that regard. Rather, the evidence proved lost profits with reasonable certainty. Accordingly, we again return the matter to the trial court for a new trial on the issue of lost profits. With respect to the other issues raised on appeal, we affirm. Defendants filed a cross-appeal challenging the trial court's award of attorney fees to Sargon. We also affirm as to that issue.

I

BACKGROUND

This is the second appeal in this case. In 1991, Sargon obtained patents on a dental implant. Sargon desired that USC use the implant in teaching at its dental school, and USC requested a clinical study be conducted to allow USC to provide academic support for the device. The implant had the approval of the United States Food and Drug Administration (FDA), permitting it to be sold and used in the United States. In November 1996, the parties entered into a Clinical Trial Agreement (CTA), intending to conduct a five-year study of the implant. Over a year into the study, Sargon contended USC failed to deliver timely the promised reports and otherwise breached the CTA.

On May 7, 1999, Sargon filed this action against USC and certain faculty members of USC's dental school involved in the study. Sargon asserted claims for breach of contract, fraud, and other torts. USC cross-claimed for breach of contract. After Sargon's tort claims and claims against the individuals were eliminated by demurrer and summary judgment, the remaining contract action against USC was tried in 2003. Before trial, the court ruled in limine, excluding evidence of Sargon's lost profits on the ground they were not foreseeable to defendants. The jury awarded Sargon $433,000 in compensatory damages on its breach of contract claim, and found for it on USC's cross-complaint for breach of the CTA. The trial court found USC to be the prevailing party because Sargon's verdict was less than USC's Code of Civil Procedure

section 998 offer, and awarded USC attorney fees. (All undesignated section references are to the Code of Civil Procedure.)

Sargon appealed the judgment, but USC did not separately appeal the judgment against it on its cross-complaint. We reversed, finding the trial court erred in excluding evidence of Sargon's lost profits on the grounds of foreseeability and remanded for a new trial on that issue. We also reversed the judgment of dismissal on Sargon's fraud claims, and reversed the postjudgment orders awarding USC costs and attorney fees. (*Sargon Enterprises, Inc. v. University of Southern California* (Feb. 25, 2005, B167519, B163707) [nonpub. opn.], p. 26 (*Sargon I*).)

On remand, in April 2006, Sargon filed a second amended complaint based on two contract and four tort theories. Sargon's claim for breach of the covenant of good faith and fair dealing was dismissed by demurrer, its tort claims by summary adjudication, and the case again proceeded to trial on the breach of contract claim. The trial court again excluded in limine evidence of lost profits. In August 2007, the parties stipulated to entry of judgment for $433,000 on the breach of contract claim, and the trial court awarded attorney fees to one of the individual defendants who had been dismissed from Sargon's second amended complaint and to Sargon on its contract claim. Sargon filed the present appeal. Defendants cross-appealed, challenging the award of attorney fees to Sargon.

Dr. Sargon Lazarof, the president and CEO of Sargon, first began placing dental implants in patients in his private practice in 1988 or 1989 after taking courses in implantology. He began to develop the Sargon implant, which could be implanted immediately following an extraction and contained both the implant and full restoration.

In the 1980's, the standard implant was the Branemark implant developed at the University of Gothenburg in Sweden. The Branemark implant required several steps. First, surgery would place the implant in a healed extraction socket in the patient's mouth; a second surgery would inspect the implant to see if it had properly integrated with the bone (a process known as "osseointegration"); last, a crown would be placed on the implant. Sargon's implant was a one stage implant: it expanded immediately into the

bone socket with an expanding screw; this mechanism permitted the implant to be "loaded" with a crown the same day.

In 1992, after obtaining a patent on the implant, Dr. Lazarof formed Sargon to develop, market, and sell the implant. After receiving FDA clearance, Sargon began marketing the implant in the United States.

Dr. Marwan Abou-Rass, one of Dr. Lazarof's professors at USC, contacted Dr. Lazarof to discuss the implant and received training in its use. After placing the implant in some of his own patients, Dr. Abou-Rass believed the implant should be used at USC, and approached Dr. Howard Landesman, the Dean of the USC dental school. Dean Landesman agreed with Dr. Abou-Rass's assessment that the Sargon implant could change dentistry. Although USC had an exclusive contract with Nobel Biocare requiring USC to use Nobel Biocare's Branemark implant exclusively, an exception to the contract with Nobel Biocare permitted USC to study other implants.

Dean Landesman proposed to Lazarof that USC conduct a study to evaluate the Sargon implant because such a study would permit USC to determine for itself that the implant could do "'what it was supposed to do.'" If the study results were good, USC would be in a position to exercise its right to cancel its contract with Nobel Biocare and position itself as the premier institution associated with the Sargon implant.

In early 1996, USC initiated a meeting with Sargon that was attended by Dr. Lazarof, Dr. Abou-Rass, Dean Landesman, and Dr. Robert Garfield, a dentist who worked for Sargon. Dean Landesman told Dr. Lazarof if the implant worked as Sargon claimed, association with USC would put USC back in the number one position it had once enjoyed among dental schools. USC told Dr. Lazarof it would need a study to prove that the implant was successful, and Dean Landesman told Dr. Lazarof, "'Give me one year, and I will give you the world.'" The one-year period was based on the scientific consensus in the dental field that if an implant had not failed after six months to one year, it was highly unlikely it would fail after that time. During the negotiations that led to the CTA, Dr. Lazarof stressed to USC the importance of a timely one-year interim report to Sargon's marketing, and Sargon would need interim six-month reports.

USC wanted to appoint defendant Dr. Winston W. L. Chee, director of implant dentistry at USC, to head the study. During the negotiations leading up to the CTA, Dr. Lazarof realized that Dr. Chee harbored animosity toward him. Dr. Chee said to Dr. Lazarof, "'Here you go, you are a general Practitioner, and I am the prostodontist, the university professor, I am specializing in restoring implants. You are a general practitioner in private practice and you have come up with this technique, and you want to come change the way USC does dentistry, and through USC you want to change the whole world and the way they do implantology.'" When he learned that Dean Landesman and Dr. Abou-Rass wanted Dr. Chee to head the study, Dr. Lazarof became concerned and informed them that Dr. Chee did not like him, did not like the Sargon implant, and was committed to Nobel Biocare's competing Branemark implant that he had been working with exclusively for many years.[1] Dr. Lazarof told them that USC would be taking a big risk in appointing Dr. Chee, and asked whether USC would be responsible if Dr. Chee compromised the study. Dean Landesman and Dr. Abou-Rass assured Dr. Lazarof they would properly supervise Dr. Chee.

In September 1996, USC appointed Dr. Lazarof clinical professor of dentistry. The purpose of the appointment was to permit Dr. Lazarof to train all faculty members to use the Sargon implant, in particular those professors participating in the study. According to Sargon, Dr. Chee objected to Dr. Lazarof's appointment as clinical professor and refused to be trained to use the implant or to allow the graduate students who were performing restorations on study patients to be trained to use the implant.

On November 8, 1996, Sargon, USC and Dr. Chee entered into the CTA, in which USC agreed to conduct a clinical trial of the Sargon implant. At a cost of $200,000, Sargon would fund the study of the implant at USC. The study would examine 40

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[1] In 1996, Dean Landesman had told Dr. Lazarof that USC had an agreement with Nobel Biocare pursuant to which USC was purchasing all of its implants for teaching from Nobel Biocare. Sargon alleged Nobel Biocare is the largest producer of implants in the world and Sargon's biggest competitor, and stood to lose if the Sargon study confirmed the efficacy of the Sargon implant.

implant sites, and cover a five-year period so that the success of the implant could be evaluated. Dr. Chee was designated as principal investigator to oversee the study in accordance with the protocols set forth in the CTA. Defendant Dr. Hessam Nowzari, a professor at USC's dental school, was to perform surgeries that were part of the study. Although USC represented that it had the expertise and qualifications to perform the study, according to Sargon, Dr. Chee had inadequate experience to conduct a clinical trial study, had never prepared a report for a clinical trial study, and was unfamiliar with the requirements for such reports.

Pursuant to the CTA, USC and Dr. Chee agreed to prepare and submit, within 30 days of each June 30 and December 31 during the time the study was being conducted, a written report to Sargon detailing the study results. In addition, Sargon had the right to review and be present at clinical procedures, and to meet and confer with Dr. Chee and other university employees involved in the study; if Dr. Chee was the principal author, Sargon had the right to review and comment on any USC publications regarding the study; otherwise, publications concerning the implant could not be disseminated without Sargon's consent; and USC was required to keep confidential all information regarding the study.

The CTA also provided at paragraph 11.3 that USC and Dr. Chee jointly and severally represented that "[t]o their actual knowledge, without any duty to investigate, they know of no reason why Dr. Chee will not continue to serve as the Principal Investigator throughout the entire Research Period." Dr. Chee signed the CTA both on behalf of USC and "individually, solely as to the representations, warranties and covenants contained in Section 11.3 hereof."

At the end of 1997, when he had not received any reports from the study, Dr. Lazarof asked Dean Landesman, Dr. Chee, and Dr. Nowzari for them. They told Dr. Lazarof that USC was going to release the report orally at a USC periodontal symposium in February 1998 and at a Monte Carlo symposium in April 1998. Further, they would not provide Dr. Lazarof with a report until after the Monte Carlo symposium. At the February 1998 symposium, Dr. Chee reported a 100 percent success rate for the

Sargon implant. At that time, Dr. Nowzari gave Dr. Lazarof a letter for use in marketing the implant in Saudi Arabia. The letter stated that "'our animal and human studies conducted in USA and Europe confirm the superiority of the Sargon Dental Implant to our present system (Branemark System)'" and that the "'Sargon tooth replacement system has been introduced at the USC School of Dentistry as the system of choice for patient care.'" In March 1998, Dean Landesman and Dr. Chee sent Dr. Lazarof a letter advising him that USC had completed the last of the implants called for by the study, and 16 months into the study, there had not been a single failure.

At the Monte Carlo symposium in April 1998, over 400 dentists and leaders of the dental profession attended. Sargon paid for the symposium at a cost of $172,000. At the symposium, Dr. Chee and Dr. Nowzari made very positive comments about the implant and stated that the one-year success rate was 100 percent. After hearing about the implant's success, many of the dentists who attended the symposium asked Dr. Lazarof for a copy of the report and expressed interest in using or distributing the implant. A book about the implant, "The Immediate Load Implant System: Esthetic Implant Dentistry for the 21st Century," was available that had been authored by Dr. Nowzari and two other dentists participating in the study. But when Sargon was not able to provide copies of the study report, Dr. Lazarof alleged Sargon lost credibility with dentists.

Dr. Lazarof continued to ask Dean Landesman for the study report. In the Fall of 1998, he learned Dean Landesman was leaving the dental school and would be replaced by Dr. Gerald Vale. In the latter part of 1998, Dean Landesman and Dean Vale told Dr. Lazarof that Dr. Chee was causing the delay in the report because he was refusing to provide it. In February 1999, Dr. Lazarof received the first report. According to Sargon, the report failed to summarize results of the work in customary clinical format because it failed to contain sufficient and detailed information on the patients in the study; the report was unprofessional in appearance; it was not on USC letterhead; and it did not mention USC or state that the study was being conducted by USC. Further, the study itself was not in accord with the protocol; medically inappropriate patients were admitted; and

improper implant cement was used in numerous cases. As a result, Sargon was not able to use the report to market the implant.

Dr. Lazarof asked Dean Vale and Dean Landesman to provide him with the patient records. In April 1999, Dean Vale and Dean Landesman told him they could not get Dr. Chee to give them the records, and there was nothing they could do about it. As a result, in May 1999, Dr. Lazarof filed this action.[2]

In July 1999, while this action was pending, Dr. Chee provided a second written report. Although it was printed on USC letterhead, the second report — according to Dr. Lazarof — suffered from similar deficiencies as the first report. In addition, it was not signed by Dr. Chee and described problems in patients that had not been set forth in the first report, causing Dr. Lazarof to become suspicious that USC was either describing problems that did not exist or was failing to follow the study protocol. Based upon his observation of implant surgeries, Dr. Lazarof concluded the second report included new information of adverse patient reactions, namely, bone loss, fistulas, and bleeding gums, and the patient charts had been altered by deletions and additions in order to make them consistent with negative comments in the second report.

Dr. Lazarof did not receive any patient records until September 1999 when they were produced in response to a court order. He did not receive the complete records until six or seven months later. Dr. Lazarof's review of the records showed that of the 23 patients (who received a total of 43 implants), 12 patients (who received a total of 20 implants) should not have been included in the study because they fell within the exclusion criteria: They exceeded the age limit of 65, smoked, used alcohol, had poor bone quality, psychiatric problems, infections, or were undergoing other treatments

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[2] The first amended complaint alleged claims against USC, Dr. Chee, Dr. Nowzari and several other individual defendants for breach of written contract, intentional interference with prospective economic advantage, trade disparagement, violation of Business & Professions Code section 17200, conversion, fraudulent deceit, fraudulent misrepresentation, fraud, breach of the covenant of good faith and fair dealing, negligence, and breach of oral agreement.

before the implants could be used. Some patients had more than one of these exclusion criteria.[3]

After terminating the study, in December 1999 Sargon did not contact any other dental schools to do a study of the implant.

In June 2000, Dr. Lazarof learned that Nobel Biocare had made substantial monetary payments to USC and paid honorariums to Dr. Chee.

II

DISCUSSION

On appeal, Sargon challenges (1) the sustaining of the demurrer to its breach of covenant claim, (2) the granting of the motion for judgment on the pleadings as to its breach of contract claim as to Dr. Chee, (3) the granting of the summary adjudication motion as to its fraud claim, (4) the granting of the motion in limine to exclude evidence of lost profits, and (5) the award of attorney fees to Dr. Chee. USC cross-appeals as to the award of attorney fees to Sargon.

We conclude the trial court properly resolved all of these issues with the exception of the granting of the in limine motion to exclude evidence of lost profits. We therefore remand the case for a new trial on that issue.

A. Demurrer to Second Amended Complaint

On review of the sufficiency of a complaint against a general demurrer, """[w]e treat the demurrer as admitting all properly pleaded material facts, but not contentions, deductions or conclusions of fact or law."""" (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) We also consider matters subject to judicial notice. (*Ibid*.) Our sole task is to determine as a matter of law whether the complaint states a cause of action. (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300.) "[W]hen [a demurrer] is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its

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[3] Twelve patients had exclusion criteria, as follows: age violations (four), smokers (three), diabetic (one), alcohol (two), poor bone quality (four), psychiatric problems (one), adjacent infection (one), concomitant treatment required (one).

discretion and we reverse; if not, there has been no abuse of discretion and we affirm." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The burden of proving such reasonable possibility rests squarely on the appellant. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

On April 10, 2006, Sargon filed its second amended complaint against USC, Dr. Chee, and Dr. Nowzari, alleging claims for breach of contract, breach of the covenant, fraud, intentional interference with economic advantage, breach of fiduciary duty, and negligence. (Dr. Nowzari is not a party to this appeal.)

The second amended complaint alleged as follows.

The first cause of action, for breach of contract, against Dr. Chee and USC, alleged they breached the CTA by failing to provide the written reports as provided in the CTA; failing and refusing to permit Sargon to review and copy patient records as provided in the CTA; failing and refusing to permit Sargon to be present at all clinical procedures and to meet and confer with persons involved in the study as provided in the CTA; publishing descriptions of the study without providing Sargon with a written copy of the proposed publication for Sargon's review and comment as provided in the CTA; releasing and disseminating information regarding the CTA and the study without Sargon's prior written consent as provided in the CTA; releasing and disclosing confidential information to third parties and known competitors, as that term was defined in the CTA; and selecting patients for the study who were not within the age or health guidelines of the study. Sargon also alleged that it was entitled to attorney fees on this claim pursuant to this court's opinion in *Sargon I*.

The second cause of action, for breach of the covenant, alleged that USC and Dr. Chee had breached the covenant by, among other things, intentionally selecting patients of the study who were not within the age or health guidelines of the study; intentionally including patients in the study the parties had agreed to exclude; improperly discrediting the study by informing third parties that the implant had unacceptably high rates of failure; destroying, altering and damaging records; failing to disclose receipt of

contributions from Sargon's largest competitor, Nobel Biocare; and permitting the approval of the study by the Institutional Review Board (IRB) of USC to lapse.

The third cause of action, for fraud, alleged that USC and Dr. Chee misrepresented their expertise, willingness, and qualifications to perform the study competently, and misrepresented that they intended to perform their obligations as described in the CTA. Sargon alleged such representations were known to be false at the time USC and Dr. Chee made them, and had Sargon known the true facts, it would not have engaged in promotion, marketing, sales, and other activities.

The second amended complaint also alleged in its fourth, fifth and six causes of action, which are not at issue here, claims for intentional interference with economic advantage; breach of fiduciary duty based on defendants' entrustment with Sargon's confidential patient information and intellectual property; and negligence based on defendants' failure to perform the CTA competently.

Defendants demurred to all causes of action in the second amended complaint except the first cause of action for breach of the CTA. Defendants argued that with respect to the claim for breach of the covenant, Sargon sought to relitigate issues that had previously been adjudicated against it. In particular, Sargon claimed that defendants had breached the CTA (1) by selecting patients for the study who were not within the age guidelines, (2) intentionally including in the study patients that the parties had previously agreed to exclude, and (3) improperly discrediting the study by informing third parties that the implant had unacceptably high levels of failure. Defendants contended that in *Sargon I* we drew a distinction between the primary right underlying the fraud allegations and the contract allegations by finding the fraud allegations involved acts outside the scope of the CTA. Further, in *Sargon I*, we granted leave to plead a breach of the covenant, but only insofar as it was based on the alteration of patient records.[4] Therefore,

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[4] In *Sargon I*, we stated that we agreed with Sargon's analysis that "'[t]he mere failure of performance of the clinical trial agreement does not violate the same primary right as actions deliberately and fraudulently undertaken to destroy the reputation of the implant by altering patient records, accepting bribes from plaintiff's competitor, and

by pleading breach of the covenant based upon the three classes of acts, Sargon was seeking to relitigate issues previously adjudicated in *Sargon I.*

Sargon argued in opposition to the demurrer that collateral estoppel did not preclude its breach of the covenant claim because collateral estoppel did not apply to further proceedings in the same case; *Sargon I* specifically mentioned that claim and did not consider it to be precluded by prior proceedings;[5] defendants did not demur to the remaining factual allegations underpinning the claim;[6] and the jury's verdict established that it found against USC on these three factual issues.

The parties submitted supplemental briefing as to whether the breach of covenant claim was (1) the legal equivalent of Sargon's breach of contract claim or (2) foreclosed by *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654 and its progeny, including *Mitsui Manufacturers Bank v. Superior Court* (1989) 212 Cal.App.3d 726. Sargon argued that a claim for breach of the covenant was independent of a breach of contract claim. While acknowledging that such a claim that relied on the same alleged acts and sought the same damages could be disregarded as superfluous, Sargon argued that where the underlying acts supporting each claim differed, a claim for breach of the covenant was distinct where none of the acts complained of were disallowed by the agreement, but had the effect of injuring the plaintiff's right to receive the benefits of the agreement. Sargon also argued that, under *Foley*, breach of the covenant need not be tortious, and could constitute a claim grounded in contract law.

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permitting approval of the [IRB] to lapse. [¶] Importantly, none of the alleged fraudulent acts need to be shown by plaintiff to prevail on the breach of contract action." (*Sargon I*, at p. 19.)

[5] In *Sargon I*, we stated that the breach of the implied covenant claim was based upon the alteration of patient records. (*Sargon I*, at p. 4.) Sargon's first amended complaint alleged breach by defendants (USC and Dr. Chee) through the destruction, alteration, and damaging of patient records.

[6] These allegations stated that defendants destroyed, altered and damaged records; failed to disclose receipt of contributions from Sargon's largest competitor, Nobel Biocare; and permitted the approval of the study by the IRB of USC to lapse.

Defendants' supplemental brief argued that Sargon's only damages for breach of the covenant were contract based, and the claim was barred because Sargon had already recovered contract damages. Further, tort claims for breach of the covenant were only permitted where the plaintiff could allege a special relationship, and generally were limited to the insurance context.

The trial court sustained the demurrer without leave to amend the second (breach of covenant) and fifth (breach of fiduciary duty) causes of action. The trial court overruled the demurrer to the remaining causes of action, and defendants answered the second amended complaint. On appeal, Sargon contests only the trial court's dismissal of its second cause of action for breach of the covenant. We agree with the trial court.

First, Sargon argues it was not required to plead a special relationship because it was not seeking tort damages. Second, Sargon contends breach of the underlying contract was not necessary to allege a breach of the covenant, and it alleged a separate breach of the covenant because the second amended complaint in paragraph 40(b)–(f) stated facts supporting a finding that USC engaged in conduct to deny Sargon's right to the benefits of the contract. Defendants argue that of the five acts alleged in support of the covenant claim, four of them (improper patient base, alteration of patient records, discrediting of the study and permitting lapse of the IRB approval) duplicated the breach of contract claim, while the remaining claim, defendants' receipt of contributions from Nobel Biocare, was not prohibited by the contract.

The law implies "in every contract a covenant by each party not to do anything which will deprive the other parties thereto of the benefits of the contract." (*Harm v. Frasher* (1960) 181 Cal.App.2d 405, 417.) The covenant imposes upon each party to the agreement the obligation to do everything that the contract presupposes they will do to accomplish its purpose, and to refrain from doing anything to injure the right of the other to receive the benefits of the contract. (*Schoolcraft v. Ross* (1978) 81 Cal.App.3d 75, 80; *Sheppard v. Morgan Keegan & Co*. (1990) 218 Cal.App.3d 61, 66.) Good faith and fair dealing is defined as "'"faithfulness to an agreed common purpose and consistency with the justified expectations of the other party [and] excludes . . . a variety of types of

conduct characterized . . . as involving 'bad faith' because they violate community standards of decency, fairness, or reasonableness.'"" (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1393, fn. 15 (*Careau*), quoting Rest.2d Contracts, § 231, com. a.)

The breach of a specific provision of the contract at issue is not necessary to a claim for a breach of the covenant. (*Schwartz v. State Farm Fire & Casualty Co.* (2001) 88 Cal.App.4th 1329, 1339.) The breach of the covenant as an independent basis for a claim is, however, limited by the contract itself. The covenant cannot vary the express terms of the contract. (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc*. (1992) 2 Cal.4th 342, 374 (*Carma*).) Thus, the covenant may not be read to prohibit a party from doing that which is expressly permitted by the agreement. (*Ibid.*) Nor can the covenant impose duties or limits beyond the express terms of the contract. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349 (*Guz*).) As explained in *Guz*, "[t]he covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made.*" (*Id.* at p. 349.) Further, although breach of the underlying contract may also constitute a breach of the covenant, "a claim that merely realleges that breach [of contract] as a violation of the covenant is superfluous." (*Guz*, at p. 352.) Hence the conundrum of alleging a breach of the covenant: To the extent the claim for breach seeks to impose limits on the contract beyond that to which the parties agreed, it fails; and to the extent the covenant is used to invoke terms to which the parties did agree, it is superfluous. (*Ibid*.) Nonetheless, a breach of the covenant of good faith and fair dealing gives rise to an action for damages. (*Harm v. Frasher*, *supra*, 181 Cal.App.2d at p. 415.)

Here, Sargon has realleged violations of the underlying CTA as the basis for a breach of the covenant, alleged extra-contractual conduct that is not prohibited by the contract, or failed to otherwise allege a breach of the covenant. Thus, the trial court properly dismissed the breach of covenant claim by way of demurrer.

B. Motion for Judgment on the Pleadings

A motion for judgment on the pleadings is the equivalent of a general demurrer when the motion is brought by a defendant. On appeal, we assume the truth of all facts properly pleaded in the complaint, and may consider matters subject to judicial notice. (*Bezirdjian v. O'Reilly* (2010) 183 Cal.App.4th 316, 321.)

On March 21, 2007, defendants filed a motion for judgment on the pleadings on the ground the second amended complaint failed to state a breach of contract claim against Dr. Chee. Defendants argued that Sargon had voluntarily dismissed Dr. Chee before the trial in *Sargon I*, and USC was the only party found liable for breach of contract. As we stated in *Sargon I*, the recovery of lost profits was the only issue to be retried on remand. (*Sargon I*, at p. 22.) Further, defendants argued Dr. Chee could not be liable for breach because he was only a party to the terms of paragraph 11.3, where he represented and warranted he knew of no reason why he could not be principal investigator of the study. Paragraph 11.3 provided: "'[T]he University and Dr. Chee . . . represent, warrant and covenant to the Sponsor as follows: (a) to their actual present knowledge, without any duty to investigate, they know of no reason why Dr. Chee will not continue to serve as the Principal Investigator throughout the entire Research Period. (b) Each of them will notify the Sponsor . . . of any set of facts and circumstances which are reasonably likely to result in Dr. Chee's ceasing to serve as the Principal Investigator. . . .'"

Sargon contended Dr. Chee's liability was not limited to paragraph 11.3 because Dr. Chee signed the CTA both individually and as director of implant dentistry. Further, Sargon argued it specifically alleged numerous acts constituting breaches of the CTA by Dr. Chee, including his failure to provide Sargon written reports, failure to permit Sargon to review patient records and be present at clinical procedures, publication of study results without Sargon's review and comment, releasing information about the study without Sargon's written consent, revealing and disclosing confidential information, and selecting inappropriate patients for the study. Finally, Sargon claimed that the parties

intended to make Dr. Chee liable under the CTA, or at the very least, there was an ambiguity in the CTA whether Dr. Chee was individually liable.

In the trial court, Sargon did not dispute that Dr. Chee had been dismissed from the breach of contract claim before the *first* trial and that, after the *first* appeal (*Sargon I*), we remanded only for the purpose of determining Sargon's recovery of lost profits on the contract claim. The trial court therefore granted defendants' motion, dismissing the breach of contract claim against Dr. Chee in the second amended complaint. Sargon cites no authority permitting it to dismiss a party in a lawsuit and later seek a trial against that party in the same lawsuit on remand.

We conclude that pursuant to the doctrine of res judicata, Sargon's contract claim against Dr. Chee could not be revived on remand. That doctrine precludes relitigation of the same cause of action and piecemeal litigation by splitting a single cause of action. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896–897; *Merry v. Coast Community College Dist.* (1979) 97 Cal.App.3d 214, 221–222.) "The prior final judgment on the merits settles issues which were not only actually litigated but every issue that might have been raised and litigated in the first action." (*Merry v. Coast Community College Dist.*, *supra*, 97 Cal.App.3d at p. 222.) Sargon's breach of contract claim was reviewed in *Sargon I*, which is final. Sargon's claims against Dr. Chee are merged into the *Sargon I* judgment on the contract claim and may not be raised in a trial on remand. Therefore, the trial court did not err in dismissing the breach of contract claim against Dr. Chee.

C. Motion for Summary Adjudication

"[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) "Once the [movant] has met that burden, the burden shifts to the [other party] to show that a triable issue of one or more material facts exists as to that cause of action." (§ 437c, subd. (p)(1); *Aguilar*, at p. 850.) A triable issue of material fact exists where "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the

party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, at p. 850.) Where summary judgment has been granted, "[w]e review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the trial court properly excluded) and the uncontradicted inferences the evidence reasonably supports." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) The same rules apply to summary adjudication. (See *Lomes v. Hartford Financial Services Group, Inc*. (2001) 88 Cal.App.4th 127, 131.)

Defendants moved for summary adjudication of Sargon's claims for fraud, intentional interference with prospective economic advantage, and negligence. On appeal, Sargon contests the summary adjudication of the fraud claim only. And it does not challenge that ruling as to Drs. Chee and Nowzari.

The elements of a fraud claim are: "'(1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to defraud (i.e., to induce reliance); (4) justifiable reliance; and (5) resulting damage.'" (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239.) "'Promissory fraud' is a subspecies of [an] action for fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.)

Both claims require a showing of reliance on the misrepresentations. Whether reliance was reasonable is a question of fact for the jury, and may be decided as a matter of law only if the facts permit reasonable minds to come to just one conclusion. (*Alliance Mortgage Co. v. Rothwell, supra,* 10 Cal.4th at p. 1239.) Further, whether reliance is reasonable in an intentional fraud case is not tested against the "standard of precaution or of minimum knowledge of a hypothetical, reasonable man." (*Seeger v. Odell* (1941) 18 Cal.2d 409, 415.) Reliance exists when the misrepresentation or nondisclosure was an immediate cause of the plaintiff's conduct which altered his or her legal relations, and when without such misrepresentation or nondisclosure he or she would not, in all

reasonable probability, have entered into the contract or other transaction. (*Spinks v. Clark* (1905) 147 Cal. 439, 444.)

Although parol evidence is usually admissible to establish fraud, it may not be admitted to establish promissory fraud. (*Pacific State Bank v. Greene* (2003) 110 Cal.App.4th 375, 390.) Therefore, evidence may not be admitted "to show a promise which contradicts an integrated written agreement [unless] the false promise is either independent of or consistent with the written agreement . . . ." (*Wang v. Massey Chevrolet* (2002) 97 Cal.4th 856, 873.) Here, because defendant's representations concerning their intended performance under the CTA were consistent with the language and purposes of the CTA, they are admissible.

Sargon argues the trial court erred in granting summary adjudication on its fraud claim because defendants failed to show Dr. Lazarof relied on Dean Landesman's and Dr. Abou-Rass's statements regarding Dr. Chee. Sargon contends reliance is a fact question, particularly under the circumstances where, as here, Dr. Lazarof responded to a speculative and hypothetical question in deposition whether he would have retained the study at USC if he had insisted on Dr. Abou-Rass but USC had insisted on Dr. Chee. (See *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814 [where representations made in reference to a material matter and action has been taken, absent evidence to the contrary, it will be presumed representations were relied on].)

Here, the uncontroverted evidence established that Dr. Lazarof did not rely on Dean Landesman's or Dr. Abou-Rass's statements about Dr. Chee in agreeing to the CTA. Dr. Lazarof was aware from the outset that Dr. Chee harbored significant animosity toward him and intended to "bury" the Sargon implant. Yet, notwithstanding that knowledge, Dr. Lazarof agreed to permit Dr. Chee to head the study. Therefore, it is indisputable he did not rely on anything Dean Landesman or Dr. Abou-Rass told him about Dr. Chee. (See *Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1666–1667 [when reasonable minds could not disagree, reliance becomes question of law].)

Because USC established a lack of reliance as a matter of law, the trial court properly adjudicated Sargon's fraud claim in favor of the university.

D. Exclusion of Evidence on Lost Profits

The exclusion of expert testimony is generally reviewed for an abuse of discretion standard. (*Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1493.) Here, the trial court erroneously excluded the proffered testimony.

"Technical arguments about the meaning and effect of expert testimony on the issue of damages are best directed to the jury." (*Heiner v. Kmart Corp*. (2000) 84 Cal.App.4th 335, 347.)

"Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. . . . The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. . . . This is especially true where, as here, it is the wrongful acts of the defendant that have created the difficulty in proving the amount of loss of profits . . . or where it is the wrongful acts of the defendant that have caused the other party to not realize a profit to which that party is entitled." (*GHK Associates v. Mayer Group, Inc*. (1990) 224 Cal.App.3d 856, 873–874, citations omitted, followed in *MHC Financing Limited Partnership Two v. City of Santee* (2010) 182 Cal.App.4th 1169, 1181, fn. 11.)

"[W]here the operation of an *established business* is prevented or interrupted, as by a tort or breach of contract or warranty, damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable for the reason that their occurrence and extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales. . . . On the other hand, where the operation of an *unestablished business* is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative. . . . But although generally objectionable for the reason that their estimation is conjectural and speculative, anticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability. . . . [D]amages for the loss of prospective profits are

recoverable where the evidence makes reasonably certain their occurrence and extent." (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 883.) The present case involves an established business.

"It is enough to demonstrate a reasonable probability that profits would have been earned except for the defendant's conduct." (*Kids' Universe v. In2Labs*, *supra*, 95 Cal.App.4th at p. 884.) "[D]amages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like." (*Ibid.*)

At the retrial of the breach of contract claim, Sargon's expert, James Skorheim, opined that, but for defendants' conduct, Sargon's dental implant would have obtained a market share comparable to a handful of the world's leading dental implant companies. Under Skorheim's approach, the jury would determine the level of innovativeness of Sargon's implant, and based upon that determination, choose a corresponding percentage market share; this market share would translate into between $220 million and $1.18 billion in lost profits.

USC moved in limine to exclude Skorheim's testimony, contending (1) his market share theory was not based on Sargon's historical financial results and made comparisons to dissimilar companies; (2) Skorheim had no basis to opine that Sargon's degree of innovativeness would lead to any particular share of the market; and (3) Skorheim admitted that numerous speculative events would need to occur for Sargon to realize its claimed lost profits.

Sargon argued that Skorheim's opinion was based upon Sargon's historical financial results; similar companies for purposes of lost profits analysis need not be companies of the same size, revenues, products, or location as Sargon; Skorheim did not need to be a dental implant expert to render an opinion; the jury was equipped to evaluate the innovativeness of Sargon's implant relative to others in the marketplace based upon expert evidence that would be presented at trial; and Skorheim's analysis was not speculative because it was based on the performance of similar companies.

Defendants countered that Skorheim had admitted historical data was not relevant; the law created no exception for plaintiffs who seek more damages than reflected by past performance; there was no factual similarity between the six comparison companies, and the "major drivers" of success theory was not a substitute for a factual comparison; it would be impossible for the jury to compare degrees of innovation; and even if the jury could rank relative innovation, it was not the sole creator of market share.

The court conducted an Evidence Code section 402 hearing to determine whether to exclude Skorheim's testimony. Skorheim, Dr. Lazarof, and two industry experts, Steven Hanson and Robert Pendry, testified.

Skorheim, a certified public accountant and attorney specializing in forensic accounting damages analysis testified that Sargon's lost profit damages from the breach of the CTA ranged from $220 million to $1.18 billion. In preparing his opinion, Skorheim reviewed litigation materials (including deposition transcripts and reports of USC's damages experts), financial information from Sargon and its competitors (including annual reports), and market analyses of the global dental implant market prepared by Millennium Research Group (MRG). Those sources covered the United States, European, and Pacific-Asian markets for dental implants. Excerpts of the MRG market analysis reports are scattered throughout Skorheim's expert report.

Skorheim conducted independent research of the dental implant market and interviewed Dr. Lazarof and industry executives Steven Hanson and Robert Pendry. Skorheim used the market share approach to lost profit damages because the methodology had been used in complicated patent cases, antitrust cases, and unfair competition cases.

Skorheim's "market share" approach was based upon a comparison of Sargon to six other large, multinational dental implant companies that were the dominant market leaders in the industry, and which controlled in excess of 80 percent of global sales (Big Six): Nobel Biocare, Straumann, 3i, Zimmer, Dentsply, and Astra Tech. Although there are approximately 96 companies worldwide that make dental implants, Skorheim believed the Big Six were the top innovators based upon his analysis of the MRG report

and market intelligence.[7] In his opinion, the remaining companies in the dental implant market rely on price, not innovation, to compete. Each of the Big Six's market share, in Skorheim's opinion, was based on three core factors: (1) innovation, (2) clinical studies establishing the efficacy of their dental implants, and (3) outreach to general practice dentists.

The value of a clinical study to an implant maker is twofold: It establishes the efficacy of the device and permits entry into the universities where students can be taught to use the device, with the expectation that, upon graduation, they will use the product in their practices. Skorheim noted that clinical success of the Sargon implant would likely have been followed by commercial success.

Nobel Biocare's Branemark implant was the pioneer implant developed in the 1960's and 1970's and required two surgeries. Straumann developed the second generation implant, which was placed in the bone without being submerged in the gum. In the early 1990's, there was very little penetration into the potential dental implant market. Out of millions of potential patients, only about 1 percent of this potential market was receiving product, presenting an opportunity for tremendous growth. In the late 1990's, the market began to grow dramatically. Industry reports demonstrated the global market was expected to grow during the period 1998 to 2009 at an annualized rate of 18.5 percent. At the time, the market craved technological innovation aimed at shortening healing time, cost, and treatment time. MRG predicted that sales of immediate load implants would grow at compound annual rates of 56.3 percent during 2002 to 2006, and 32.8 percent from 2005 to 2009. Further, MRG reported in 2004, immediate loading implants represented only a "niche" market because demand was limited by industry acceptance. By 2009, immediate load implants would account for 14.9 percent of the United States market, up from 0.4 percent in 2000.

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[7] On cross-examination, Skorheim acknowledged that MRG's report did not state the Big Six were the most innovative; rather, it was an inference he drew from reviewing the report and the size and success of the companies in comparison to other, smaller companies.

Sargon's innovation lay in the use of an "immediate load implant," the "'holy grail of dental implantology,'" which was directed at the market's need for ease of use, shortened healing times, and overall cost. Given the state of the implant market at the time, in Skorheim's opinion an innovator such as Sargon would have rapidly commanded a significant market share; with the exception of Nobel Biocare, all of the other major implant makers are recent arrivals on the scene.

Skorheim outlined similarities and differences between the Big Six and Sargon: First, they all manufactured titanium implants, and the implants were one-stage, two-stage, or immediate load (Sargon only); second, all used clinical studies; third, all used outreach to general practitioners; fourth, pricing was substantially the same; fifth, their qualitative and quantitative cost structures were the same; and the implants were manufactured either in-house or pursuant to a contract with a third party. Qualitative cost structure consisted of cost of goods sold, research and development costs (R&D), sales and marketing costs, and general administrative costs. Sargon did not have a meaningful R&D organization or a sales and marketing department. In all other respects, Sargon's costs were similar to the Big Six.

For the relevant time period, approximately 1998, Skorheim's testimony with respect to Sargon's competitors can be summarized as follows:

	Sargon (1998)	**Astra Zeneca (1999)**	**Dentsply (1998)**	**Biomet 3i (2000)**	**Nobel[8] (1998)**
Employees	< 20	> 55,000	> 6,000	> 4,000	> 1,000
R&D	$ 46,000	$ 2,923,000,000	$ 18,200,000	$ 40,208,000	$ 8,741,808
Net Sales	$1,748,612	$18,445,000,000	$795,122,000	$ 920,582,000	$164,747,305
Net Profits	$ 101,113	$ 1,143,000,000	$ 34,825,000	$ 173,771,000	$ 5,868,080
Assets	$ 544,977	$19,816,000,000	$895,322,000	$1,218,448,000	$243,621,260
Market Share (2007)[9]	N/A	4.8 %	7 %	17 %	22–23 %

[8] These figures were converted from Swedish kroner using exchange rate in effect in 1998 (7.9503 kroner to the dollar). Nobel Biocare acquired SteriOss, a United States implant company, in 1999; the acquisition increased Nobel Biocare's market share and added products to its portfolio. Astra Tech is a subdivision of Astra Zeneca. The figures (except for Nobel) reflect the conglomerates' total sales, not just sales for implants. Their "market share," however, refers to their share of implant sales.

Skorheim used Sargon's revenues in 1998 as his base year because that was when the first report was due. In 1998, Sargon had approximately $1.8 million in revenues, which was roughly one-half of 1 percent of the global market of $367 million. Sargon had three to four employees.

Skorheim asserted that in 1998 Sargon had the same "business metric" as the Big Six. For example, Sargon shared with Straumann that both sold titanium implants; both Sargon and Nobel Biocare were contacting universities for further outreach for their products. Sargon and Nobel Biocare pursued foreign distribution. In qualitative (component) terms, Sargon's cost structure was similar to 3i, although quantitatively (size-wise) it was not. Thus, in computing Sargon's profits, Skorheim used the same cost structure as Nobel Biocare and Straumann, explaining, "I found very consistent statistics and performance between Nobel Biocare and Straumann, which suggested to me, that was a very strong indicator, that the market cost structure for [an emerging] company coming out of kind of what we call the startup phase, and certainly Sargon was in that startup phase, in the mid-90's. And then by 1998, trying to get those clinical studies on, coming out of the startup phase, that the cost structure would rationalize, you know, at that point in time or around that point in time." Although Sargon had better control of its direct costs, its general and administrative cost structure was burdened. As a result, Sargon's "keep factor" (profit) was about 10 percent of gross revenues, compared with 30 percent for the larger implant companies.

Skorheim opined that if in 1998 the interim report had been positive based upon the publicity generated at the Monte Carlo symposium and other publicity generated by USC, Sargon's revenues over the next year would have doubled, giving it a 1 percent market share. Skorheim's prediction assumed Sargon was comparable with the market

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9 Straumann, another comparator company for which there was no data in the record during the relevant period, had attained a 22 percent global market share in 10 years. In 2005, Straumann's sales surpassed Swiss ₣ 500,000,000. Straumann spends approximately 5 percent of sales on R&D.

share leaders and would have attained similar success if it had been able to market its implant with the support of clinical study results from USC.

Skorheim's damages model created four alternative damage scenarios based upon the jury's determination of the innovativeness of its implant. As a predicate, Skorheim had ranked the innovativeness of the comparator companies and established a hierarchy. If the jury concluded Sargon's level of innovation was equal to the least innovative of the benchmark companies, Astra Tech, Sargon would have attained a 3.75 percent share; if the jury concluded Sargon's level of innovation was equal to one of the lesser innovators of the benchmark companies, like Dentsply, Sargon would have attained a 5 percent market share; if the jury concluded Sargon's level of innovation was equal to a middle-level innovator, like 3i, Sargon would have attained a 10 percent share; and if the jury concluded Sargon's level of innovation was that of the most innovative companies, Nobel Biocare and Straumann, Sargon would have attained a 20 percent market share.

In these four scenarios, Skorheim calculated Sargon's lost profits based on an 11-year time frame running from 1998 to 2009, as follows.

Market Share	3.75 % (Astra Tech)	5 % (Dentsply)	10 % (3i)	20 % (Nobel/Strau.)
Lost Profits 1998-2009	$120,011,000	$181,020,949	$335,940,541	$ 640,232,628
Value Post 2009	100,473,347	134,343,563	269,824,425	540,786,150
TOTAL:	220,484,347	315,364,512	605,764,968	1,181,018,778

Nonetheless, Skorheim did not have an opinion as to which of the Big Six was the most innovative company. He intended that this determination would be made by the jury, and contended it was not necessary to his calculations.

During the hearing on the motion in limine, the trial court stated that it was troubled by the "beauty contest" aspect of Skorheim's comparison of the Big Six. "How do you say a Ford is better than a Chevrolet, or a Ford is the best car on the road, or Miss Colorado should have won the Miss America contest[?]" Although the court was inclined to exclude the comparison companies with 7, 10, and 20 percent market shares

as being unreasonable as a matter of law, it was inclined to leave the "fourth bucket," namely, Astra Tech, at a 3.75 percent market share.

Defendants argued that there was no basis to conclude Sargon would have attained even Astra Tech's market share. The court responded that it was taking away "three of the four buckets," and that it "was not enamored with the beauty contest, [and] thought innovativeness was a tad bit squishy, the analysis is squishy, there's no similarity in these businesses." Further, Skorheim did not use historical data, and there was nothing to back up his assumptions. Defendants argued that even if the court left the "last bucket," Astra Tech, the court was nonetheless leaving a bucket that was not comparable to Sargon and would be requiring the jury to compare degrees of the companies' innovation in dental implant design.

Dr. Lazarof confirmed Skorheim's conclusion that innovation coupled with clinical studies was the driver of market share. Sargon also presented the testimony of Steven Hanson, president from 1992 to 2004 of Calcitek, a successful implant company, who testified Sargon could have commanded a 15 to 20 percent share of the market if the USC study had been completed, although he had not done a market study or considered the probability of all of the other steps necessary to get Sargon a 15 to 20 percent market share. Robert Pendry was at Straumann from 1992 to 2001 and at Thommen Medical from 2002 to 2006, and testified that in his opinion the Sargon implant was "absolutely revolutionary" and "world changing" when introduced in 1997 to 1998. In Pendry's words, the Sargon implant "was the most exciting thing I'd heard in the implant business ever."

At the conclusion of Skorheim's Evidence Code section 402 hearing, the trial court noted it was trying to save Sargon's case when it stated it would exclude all comparator companies except for Astra Tech. The court stated expert testimony on lost profits needed to be grounded in historical profit or comparable companies. The court reiterated that it had a problem with the "beauty contest" because it required too many assumptions to be made and there were no standards for the jury. In conclusion the court stated, "if this were a close call, it would have gone to [Sargon] in a heartbeat." The trial

court concluded that Skorheim's testimony "leaves the determination of up to a billion dollars of lost profit damages to pure speculation" and granted defendants' motion. The court found Skorheim's opinion was not based on Sargon's historical profits or those of a similar business; he used assumptions that had no reasonable factual foundation; he gave an opinion beyond his level and area of expertise; and there was no California legal authority supporting market share lost profits.

The court noted an established business may generally recover for lost profits because their extent may be ascertained with reasonable certainty from the company's past volume of business and other provable data relevant to future sales. Lost profits may be established with expert testimony and be based on economic and financial data, market surveys and analyses, and business records of similar enterprises, but there must be a similarity between the facts forming the basis of the profit project and the business opportunity destroyed. (*Kids' Universe v. In2Labs*, *supra*, 95 Cal.App.4th at p. 885.) If a lost profits analysis contains a comparison to other businesses, those businesses must be similar. (*Parlour Enterprises, Inc. v. Kirin Group, Inc.* (2007) 152 Cal.App.4th 281, 288 (*Parlour Enterprises*).)

The trial court concluded that Sargon relied on data that was not analogous to Sargon's business. Skorheim used industry leaders, all multi-million and multi-billion dollar international companies. "The only thing these established companies have in common with [Sargon] is that they all sell or make dental implants. In all other respects, in areas the MRG report deems relevant, such as size, history, product line, sales force, access to financing, among others, they are worlds apart from Sargon." While Sargon had a 5 percent profit in 1997, Skorheim used Nobel Biocare and Straumann's profits, which were at 30 percent. As a result, Skorheim's "projections are wildly beyond, by degrees of magnitude, anything Sargon has ever experienced in the past. Under the 20% market share scenario, for example, [Sargon] would see its profits climb by 534.4% the first year, and by over 157,000% by 2009." Thus, Sargon was not similar to the Big Six under any relevant, objective business measure.

The court also found that comparison of "'degrees of innovation'" failed to give the jury standards from which it could make a rational decision and was inherently speculative and subjective. Although the ranking of innovativeness among the market leaders was central to Skorheim's opinion, he had testified he did not know how the market leaders compared to each other, and refused to give an opinion on the issue. Ultimately, the only evidentiary support for the percentage market share scenarios came from Skorheim's observations of the marketplace, and his conclusion that innovative products generated more sales. To the court, this was nothing more than a tautology.

The court also found Skorheim lacked expertise in the dental industry, and therefore his opinion was pure speculation. Skorheim did nothing more than read the lay press and conduct informal interviews. Finally, the court determined that Skorheim's opinion was based upon speculative assumptions, including a series of successful clinical tests, marketing efforts, research and development, training of dentists, and relationships with universities; Skorheim believed "by 2007 Sargon would have made the seamless transition from a three-person operation to sharing industry leadership with Nobel Biocare, a multi-million dollar international corporation."

After the trial court excluded Skorheim's testimony, the parties selected a jury. Sargon informed the court it intended to put on lost profit damages based upon Sargon's historical performance and the testimony of its other experts; however, Sargon abandoned its lost profits claim and stipulated to entry of judgment on the previous $433,324.72 breach of contract award.

Sargon elected to request entry of judgment after exclusion of Skorheim's testimony because it did not believe its other two experts would provide sufficient evidence to establish its claim for lost profits.

In sum, Sargon was barred from calling Skorheim on the ground that his testimony was speculative. In substance, he would have opined that had USC not breached its contract, Sargon would have obtained a market share comparable to a handful of the world's leading dental implant companies. Using this analysis, the jury would have compared Sargon with companies having a market share of 4.8 percent, 7 percent,

17 percent, and 22–23 percent, with profits from $220 million on the low end to $1.1 billion on the high end. The jury would have been asked to select the company most comparable to Sargon and award the corresponding amount for lost profits.

Sargon claims its lost profits are reasonably certain. USC claims otherwise. Of course, damages need not be calculated with absolute certainty, but only with some reasonable basis. With new businesses, the task is more difficult, but the test is still reasonable certainty. (*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1698 ["'[L]oss of prospective profits may nevertheless be recovered if the evidence shows with reasonable certainty *both* their *occurrence* and the *extent* thereof.'"].)

USC relies on *Parlour Enterprises*, *supra*, 152 Cal.App.4th 281. That case involved a plaintiff which had a contract with a defendant subfranchising ice cream parlors. After the plaintiff opened one parlor in Los Angeles, the defendant breached, causing the plaintiff to go out of business. The plaintiff sued and was awarded over $6 million in damages, including lost profits. The defendants appealed, and the Court of Appeal determined that the award for lost profits was unsupported by substantial evidence, reducing the damages award to around $130,000. The court rejected the plaintiff's pro forma projections of lost profits because they were not based on facts that were substantially similar to the lost business opportunity; rejected the market data for Friendly's restaurants numbering 300 and for a couple dozen other ice cream parlors as not sufficiently similar to the plaintiff's ice cream parlors; and for the same reason rejected other financial information.

Sargon, for its part, relies on *Palm Medical Group, Inc. v. State Comp. Ins. Fund* (2008) 161 Cal.App.4th 206 (*Palm Medical Group*), involving a plaintiff, an occupational medical clinic in Fresno which was denied admission into the preferred provider network of the State Compensation Insurance Fund. The plaintiff sued the fund, claiming it had been excluded unfairly, and won a $1,131,000 damages award for lost profits. On appeal, the fund argued the damages award for lost profits was too speculative. The Court of Appeal disagreed, citing the plaintiff's evidence which relied

on the average gross revenue of the top four or six preferred provider network providers in Fresno which provided services comparable to the plaintiff's services.

Sargon has the better argument here. *Palm Medical Group* is more on point than *Parlour Enterprises.* In 1998, Sargon had about $1.8 million in revenues, roughly one-half of 1 percent of the global market for dental implants. Astra Tech, one of the companies relied on by Skorheim, had around $18.5 million in revenues, for a 4.8 percent market share. The other companies had greater revenues and market shares. At the very least, the jury was entitled to hear about Astra Tech because it was sufficiently similar to Sargon, and a damages award based on a comparison to that company would have been supported by substantial evidence, not speculation.

We acknowledge the difficulty in determining lost profits when an established business is built upon the sale of an innovative, revolutionary, or world-changing product. The factor of innovation — what the trial court described as a "beauty contest" — is not easily converted into dollars and cents. But exactitude is not required. None of Sargon's competitors used its implant, and, to that extent, they were different. But lost profits may be based on a comparison of similar companies; they need not be identical in all respects. Skorheim's expert opinion was based on "economic and financial data, market surveys and analyses, business records of similar enterprises, and the like." (*Kids' Universe v. In2Labs*, *supra*, 95 Cal.App.4th at p. 884.) He also considered Sargon's historical financial data. The trial court's ruling is tantamount to a flat prohibition on lost profits in any case involving a revolutionary breakthrough in an industry.

If USC had not sabotaged the clinical study of the Sargon implant, Sargon would have had a successful clinical trial to its credit and a prominent university using the implant at its dental school. But it was denied. Through its wrongful conduct, USC allegedly caused the loss of profits and has made the proof of lost profits all the more difficult, thereby rendering its evidentiary attack unconvincing. (See *GHK Associates v. Mayer Group, Inc.*, *supra*, 224 Cal.App.3d at p. 874.) We have carefully reviewed the

trial court's criticisms of Skorheim's proffered testimony and conclude they were better left for the jury's assessment.

Again we hold that Sargon is entitled to a new trial on lost profits.

E. Attorney Fees

Paragraph 13.3 of the CTA provides: "In any action on or concerning this Agreement, the prevailing party shall be awarded its reasonable attorney fees, costs and necessary disbursements, to be paid by the non-prevailing party."

Sargon argues that, for two reasons, even if Dr. Chee is the prevailing party on the contract claim as a result of the granting of his motion for judgment on the pleadings, he is not entitled to $440,000 in fees. First, Dr. Chee is estopped from claiming fees because, although he was awarded fees under a contractual fee provision, he argued he individually signed only one clause of the contract — a clause that did not contain an attorney fees provision. Second, trial the court erred in awarding Dr. Chee fees before he was added as a party on April 10, 2006, and in awarding him fees for matters litigated only by USC.

The CTA at paragraph 11.3 provided that "the University and Dr. Chee hereby jointly and severally represent, warrant and covenant" that there was no known reason why Dr. Chee could not complete the Study. The signature line for Dr. Chee stated he was signing the CTA "individually, solely as to the representations, warranties and covenants contained in Section 11.3 hereof." Dr. Chee sought $1,488,503.33 in fees pursuant to Civil Code section 1717 based upon the CTA's attorney fees provision, contending this amount constituted his pro rata share of defending the litigation. Sargon argued Dr. Chee was not entitled to any fees because he was not a party to the attorney fees provision in CTA; Dr. Chee was not entitled to fees incurred before the filing of the second amended complaint on April 10, 2006; Dr. Chee was only entitled to those fees incurred solely for his benefit, as opposed to those fees incurred jointly for his benefit and that of USC; and Dr. Chee's request was unreasonable in amount.

The trial court found that Dr. Chee was the prevailing party for purposes of section 1032, subdivision (a)(4) on the contract claim because defendants' demurrers to

the second amended complaint's contract claims were sustained, Dr. Chee's motion for judgment on the pleadings was granted, and Sargon's other claims were dismissed on summary adjudication. Further, Sargon had sought attorney fees against Dr. Chee in the second amended complaint under the CTA.

The trial court rejected Sargon's claim that Dr. Chee was not a party to paragraph 13.3 of the CTA and was therefore not entitled to fees. The court concluded the fee provision was reciprocal because Sargon would have recovered fees if it had prevailed on its claim against him; therefore, Dr. Chee had the same right against Sargon. (See Civ. Code, § 1717; *Hsu v. Abbara* (1995) 9 Cal.4th 863, 870–871; *Hasler v. Howard* (2005) 130 Cal.App.4th 1168, 1171.) The court also rejected Sargon's argument that because Dr. Chee was not a party to the action between his dismissal on March 17, 2003, and the filing of the second amended complaint, he was thus not entitled to fees until April 10, 2006. The court found that Dr. Chee benefited from the work performed on behalf of USC during that time. Further, the court refused to limit Dr. Chee to those fees expended solely for his benefit but found that an apportionment of fees incurred by all defendants was within its discretion. (See *Slavin v. Fink* (1994) 25 Cal.App.4th 722, 726.) On that basis, the court awarded Dr. Chee 20 percent of the fees expended by USC. The court determined that a reasonable amount of fees for all defendants postremand was $2.8 million and awarded Dr. Chee $560,000 of that amount, or 20 percent. Dr. Chee's fee award was later reduced to $440,000.

A litigant who prevails in an action on a contract by establishing the contract is invalid, inapplicable, unenforceable or nonexistent is entitled to fees under the contract if the opposing party would have been entitled to fees had it prevailed on the contact. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 611.) Thus, notwithstanding the language in the fee provision, the reciprocal right conferred by Civil Code section 1717 applies to an action on the contract regardless of which party initiated the action. (*Pacific Custom Pools, Inc. v. Turner Construction Co.* (2000) 79 Cal.App.4th 1254, 1268.) Where multiple parties are represented, the trial court is not required to apportion fees where the "liability of the parties is 'so factually interrelated that it would have been impossible to

separate the activities [of the attorneys] into compensable and noncompensable time units.'" (*Cruz v. Ayromloo* (2007) 155 Cal.App.4th 1270, 1277.) A defendant in a contract action is not a prevailing party when the plaintiff voluntarily dismissed the action; the defendant is not entitled to attorney fees in that situation. (See Civ. Code, § 1717, subd. (b)(2); *Santisas v. Goodin, supra,* 17 Cal.4th at p. 617.) Sargon did not raise this issue.

Here, Sargon's first argument that Dr. Chee is estopped from claiming fees under the contract because he denied he was obligated under the CTA beyond the representations and warranties of paragraph 11.3 misreads the attorney fees clause of the CTA. As noted, paragraph 13.3 provides: "In any action on or concerning this Agreement, the prevailing party shall be awarded its reasonable attorney fees, costs and necessary disbursements, to be paid by the non-prevailing party." Under the mutuality provisions of Civil Code section 1717, Sargon would have been entitled to fees under that provision to enforce paragraph 11.3 of the agreement against Dr. Chee; therefore, Dr. Chee is likewise entitled to his fees under that provision. (See *Santisas v. Goodin, supra,* 17 Cal.4th at p. 611.)

Second, the hiatus between Dr. Chee's dismissal prior to the first trial and the filing of the second amended complaint on April 10, 2006, affords Sargon no relief from attorney fees to Dr. Chee. As part of its reasonableness determination, the court found that Dr. Chee reasonably could have incurred fees in anticipation of the litigation being refiled against him. A reasonable award of attorney fees may include compensation for services rendered prior to filing the complaint. (*Stokus v. Marsh* (1990) 217 Cal.App.3d 647, 655.) Thus, although Dr. Chee was dismissed from the action on March 17, 2006, and not reinstated until the filing of the second amended complaint, Sargon makes no cogent argument why this fact, without more, makes Dr. Chee's fee request unreasonable.

Finally, Sargon does not argue why or how we should segregate fees expended on behalf of Dr. Chee individually from those expended on behalf of USC. Sargon has therefore not demonstrated error with respect to the trial court's apportionment of fees.

F. USC's Cross-appeal

Sargon challenges the timeliness of USC's cross-appeal and argues that the award of attorney fees against USC was proper. We reject the timeliness argument and affirm the fee award.

1. Motion to Dismiss

Sargon contends that USC's cross-appeal from the $1.8 million award of attorney fees to Sargon on remand from *Sargon I* in April 2006 is untimely because the appeal from that award was not filed until after judgment was entered in the remanded proceedings on August 8, 2007. In its respondents' brief, USC responds: "The University has decided not to challenge [the $1.8 million] portion of the attorney fee award. Accordingly, Sargon's motion to dismiss, which was deferred in an order dated July 8, 2008, is now moot." We therefore deny Sargon's motion.

2. Sargon's Attorney Fees

Defendants contend that (1) Sargon was not entitled to fees because its recovery on remand was less than defendants' section 998 offer, and therefore Sargon must pay their postoffer fees, and (2) the trial court awarded Sargon fees that were excessive in light of the results achieved. Because we reverse for a trial on lost profits, the first contention is moot. As to the second contention, we disagree with defendants and affirm the award.

On June 21, 2007, more than 10 days before the commencement of the retrial on July 9, 2007, defendants submitted a section 998 offer to Sargon to settle the case for $8 million. The offer did not contain a signature line for Sargon's acceptance. After entry of judgment on August 8, 2007, Sargon sought attorney fees in the sum of $4,803,215 for the work performed by Browne Woods George for the period August 1, 2005, to July 25, 2007, and $282,598 for the services of Lewis Brisbois Bisgaard & Smith. USC objected, contending that Sargon failed to obtain a more favorable judgment than USC's section 998 offer of $8 million, and sought its own fees of $2,056,355.20 as the prevailing party. USC also argued that Sargon could not claim in excess of $5 million as reasonable fees when it recovered only $433,000 at trial, and that it was not

the prevailing party for purposes of fees because it recovered nothing new at retrial by merely stipulating to the previous judgment of $433,000.

The trial court determined that in *Sargon I* we held Sargon was entitled to its fees; therefore, the only issue before it was the reasonableness of that fee. The court rejected USC's section 998 argument because the offer, dated June 21, 2007, was tardy — not made at least 10 days before the initial trial began — and it did not contain a signature line for Sargon. The court denied USC's request for fees and considered the reasonableness of Sargon's request pursuant to *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096 (*PLCM*). The court found the skill level of the attorneys involved was extraordinary and the nature of the litigation complex, and had "no quibble" with the hourly rates or number of hours billed. The court concluded that given the small recovery, a fee award of more than $6.2 million (including the $1.2 million already awarded) would be excessive. The court awarded Sargon $4 million in attorney fees.

Defendants contend the attorney fees awarded to Sargon was unreasonable in light of the small amount of the judgment in comparison to the amount of the *requested* fee award, which was in excess of $5 million. (See, e.g., *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 990–991 [inflated fee request permits trial court to reduce or deny fee award].)

Attorney fee awards begin with the "lodestar," which consists of the number of hours reasonably expended multiplied by the reasonable hourly rate. The lodestar figure may then be adjusted upward or downward based upon factors specific to the case to fix the fee at the fair market value of the services provided. (*PLCM*, *supra*, 22 Cal.4th at p. 1095.) The trial court considers a number of factors in making this determination, including the nature and difficulty of the litigation, the amount of fees involved, the skill required to handle the litigation and the skill actually employed, and the success or failure of the litigation. (*Id*. at p. 1096; see also *Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407, 416, fn. 5 (*Harman*).) "In short, after determining the lodestar amount, the court shall then '"consider whether the total award so calculated under all of the circumstances of the case is more than a reasonable amount and, if so,

shall reduce the . . . award so that it is a reasonable figure."'" (*EnPalm, LLC v. Teitler* (2008) 162 Cal.App.4th 770, 774.)

Ultimately, the trial judge has discretion to determine the value of professional services rendered, but because determination of the lodestar figures is fundamental to the calculation of the fee award, exercise of that discretion must be based on that method. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 48–49.) The experienced trial judge is the best arbiter of the value of professional services rendered in his or her court, and the award will not be disturbed unless it is "clearly wrong," that is, an abuse of discretion. (*PLCM, supra,* 22 Cal.4th at p. 1095.) The party challenging a fee award has the burden of demonstrating error. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140–1141.)

Here, we find no abuse of discretion in the award of fees given the potential size of lost profit damages sought in this case (at a minimum, $220 million) and that defendants valued the case at $8 million, as evidenced by their section 998 offer. The trial court presided over a long and complicated case. In addition, other factors militate in favor of the trial court's award: the size and complexity of the case, the reputation and expertise of counsel involved; the requirement of expert testimony; the numerous motions (demurrer, motion for judgment on the pleadings, summary judgment, motion in limine, motion for attorney fees) and depositions involved. The case has involved two trials and one appeal, as well as numerous hearings.

Defendants nonetheless argue Sargon's attorney fees award must be reduced because it exceeded $2.2 million in fees on remand to obtain the same result as the first trial. (See, e.g., *Hensley v. Eckerhart* (1983) 461 U.S. 424, 434 [103 S.Ct. 1933] [lodestar should not include hours not reasonably expended in pursuit of successful claims].) *Hensley* directs that the court must consider whether the plaintiff failed to prevail on claims unrelated to the claims on which he or she succeeded. (*Ibid.*) But attorney fees need not be apportioned where they are incurred for representation on an issue common to both a cause of action on which fees were proper and one in which they were not allowed. (*Harman, supra,* 158 Cal.App.4th at p. 417.) If successful and unsuccessful claims are related, the trial court must evaluate the significance of the

overall relief obtained by the plaintiff in relation to the hours expended. (*Hensley*, at p. 435.) The court may reduce the lodestar calculation "'"if the relief obtained, however significant, is limited in comparison to the scope of the litigation as a whole."'" (*Harman*, at p. 418.) Here, Sargon's trial claims related to the breach of contract claims; the tort claims had been dismissed prior to trial. Thus, the bulk of fees were incurred on a successful claim. In addition, the record indicates the trial court considered all of the necessary factors in awarding fees, and in fact reduced the fees based on Sargon's failure to obtain lost profit damages on remand.

Finally, we note that in *Meister v. Regents of University of California* (1998) 67 Cal.App.4th 437, the court held that a trial court had discretion to reduce an attorney fees award by the amount of fees incurred by the plaintiff after the plaintiff declined an *informal* settlement offer for an amount greater than that recovered at trial, relying on the policy underlying section 998. (*Id*. at p. 452.) But in *Greene v. Dillingham Construction N.A., Inc.* (2002) 101 Cal.App.4th 418, the court held that section 998 has no application to an *informal* settlement offer made during mediation where the offeree recovered less at trial. *Greene* disagreed with *Meister* that an informal settlement offer could be used as a factor in determining the reasonableness of attorney fees. *Greene* reasoned in part that *Meister* ignored the procedural protections afforded by section 998, and its punitive provisions had no application to a confidential mediation. (*Id*. at pp. 425–426.) We decline to extend *Meister* to circumstances where, as here, the section 998 offer failed to give the offeree proper notice that the punitive provisions of the statute would apply if the offer were declined.

Defendants make no further attack on the fee award to Sargon. Nor do they suggest that if we reverse for a new trial on lost profits, we need to reverse the fee award. So we leave the award as it is.

Any request for appellate attorney fees should be presented in the first instance to the trial court on remand. (See Cal. Rules of Court, rule 3.1702(c).)

III

DISPOSITION

The judgment is reversed and the matter is remanded for a new trial on lost profits. The orders (1) sustaining the demurrer to plaintiff's claim for breach of the covenant of good faith and fair dealing, (2) granting the motion for judgment on the pleadings as to plaintiff's breach of contract claim against defendant Winston W. L. Chee, (3) granting summary adjudication on plaintiff's fraud claim, and (4) awarding attorney fees to defendant Winston W. L. Chee and plaintiff, respectively, are affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

MALLANO, P. J.

I concur:

CHANEY, J.

JOHNSON, J., Concurring and Dissenting.

I join in the majority decision in all respects except that I respectfully dissent from the majority's ruling in part II.D finding that the trial court abused its discretion in excluding Skorheim's expert testimony on Sargon's lost profits, and reversing for a new trial on the issue of lost profit damages.

I.

In overturning the trial court's rejection of Sargon's alchemic approach to damages, the majority misapplies the standard of review on evidentiary rulings. Abuse of discretion requires reversal only where the trial court's ruling is arbitrary, capricious, and beyond the bounds of reason. (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431; *Walker v. Superior Court* (1991) 53 Cal.3d 257, 272.) The trial judge's exercise of discretion is guided, however, by fixed legal principles. "'The scope of discretion always resides in the particular law being applied, i.e., in the "legal principles governing the subject of [the] action . . . ." Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an "abuse" of discretion.'" (*Department of Parks & Recreation v. State Personnel Bd.* (1991) 233 Cal.App.3d 813, 831.)

The burden is on the complaining party to establish abuse of discretion, and an appellant's showing on appeal is insufficient if it presents a state of facts which simply afford an opportunity for a difference of opinion between the trial and appellate courts. (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 118.) To say that a court has discretion in a given area of the law is to say that it is not bound to decide the question one way rather than another. Accordingly, an abuse of discretion standard *requires* appellate courts to allow different trial courts to reach different conclusions regarding the admissibility of evidence.

The deference accorded a trial court's discretionary ruling is based on the rationale that the trial court is a presumptively more capable decisionmaker because of its "observation of . . . witnesses [and] superior opportunity to get the 'feel of the case.'" (*Noonan v. Cunard Steamship Co.* (2d Cir. 1967) 375 F.2d 69, 71 (lead opn. of Friendly,

J.).) Judge Friendly and other legal scholars have suggested that discretion is appropriate where the facts and circumstances involved are "endlessly variable, it is not possible to devise a rule of law or principle of decision to cover any group of situations." (Rosenberg, *Appellate Review of Trial Court Discretion* (1978) 79 F.R.D. 173, 181.) Discretion supported by this rationale is transitory until experience in the area of law grows, and "appellate courts are able to fashion criteria for rules that ultimately harden into rules or, at least, into guiding principles." (*Ibid.*)

As a consequence, the abuse of discretion standard of review focuses more on the process of the trial court's decisionmaking than its result. We should be more concerned with whether the trial court reached a reasoned result based on the applicable law than whether we would have reached the same result. Where, as here, the law does not offer precise parameters to the quantum of proof required to establish lost profit damages, a trial court must be permitted to draw the line in the sand, either letting the evidence in as meeting the certainty threshold, or excluding it as below that threshold. The placement of that threshold is left to the trial court so long as it is within the bounds of the law.

II.

Pursuant to Evidence Code section 801, subdivision (a), a person who qualifies as an expert may give testimony in the form of an opinion if the subject matter of that opinion is "sufficiently beyond common experience that the opinion of [the] expert would assist the trier of fact." *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, explained the role of expert testimony at trial. "[E]ven when the witness qualifies as an expert, he or she does not possess a carte blanche to express any opinion within the area of expertise." (*Id.* at p. 1117.) An expert's opinion based upon assumptions of fact without evidentiary support, or an expert's opinion based upon speculative or conjectural factors, has no evidentiary value and may be excluded. "Exclusion of expert opinions that rest on guess, surmise or conjecture [citation] is an inherent corollary to the foundational predicate for the admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues it must decide?" (*Ibid.*) Further, an expert's opinion that "something *could* be true if certain assumed facts are

true, without any foundation for concluding those assumed facts exist in the case before the jury, does not provide assistance to the jury because the jury is charged with determining what occurred in the case before it, not hypothetical possibilities. . . . An expert who gives only a conclusory opinion does not *assist* the jury to determine what occurred, but instead supplants the jury by *declaring* what occurred." (*Id.* at pp. 1117–1118.) Where expert testimony is based upon assumptions of fact not supported by the evidence, "[i]t is not enough to say that the expert's false assumptions of fact can be exposed through cross-examination. If the expert opinion is based upon assumptions of fact that are not supported by the evidence, it is speculative. It should never be admitted . . . ." (2 Dunn, Recovery of Damages for Lost Profits, (6th ed. 2005) § 7.15, p. 612.

Lost profits are a species of special damages. (*Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 975.) California has long recognized "the general principle that damages for the loss of prospective profits are recoverable where the evidence makes reasonably certain their occurrence and extent." (*Grupe v. Glick* (1945) 26 Cal.2d 680, 693 (*Grupe*); *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 907.) "It is enough to demonstrate a reasonable probability that profits would have been earned except for the defendant's conduct." (*S.C. Anderson, Inc. v. Bank of America* (1994) 24 Cal.App.4th 529, 536.)

Moreover, "'[w]here the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. [Citations.] The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. [Citation.]' [Citation.]" (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1585.) "In reviewing a damage award of lost business profits, the appellate court must couple the substantial evidence concept with recognition that evidentiary imponderables are unavoidable." (*Guntert v. City of Stockton* (1976) 55 Cal.App.3d 131, 143.) "The law will allow reasonably calculated damages even if the result is only an approximation." (*Ibid.*) Nonetheless, "*where anticipated profits dependent upon future events*," *they would be allowed only* "*where*

their nature and occurrence can be shown by evidence of reasonable reliability." (*Grupe*, *supra*, 26 Cal.2d at p. 693, italics added.)

Loss of prospective profits for a new business may be recovered if the evidence shows with reasonable certainty both their occurrence and extent. Courts have permitted recovery for lost profits from a new business where owners have experience in the business they are seeking to establish, and where the business is in an established market. (*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1698.) Evidence of lost profits may also be established with reasonable certainty with the aid of expert testimony, economic and financial data, and business records of similar enterprises. (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 884.)

III.

Here, the trial court's exclusion of Skorheim's projections did not exceed the bounds of reason, nor was its decision arbitrary or capricious. Rather, its decision was founded on a detailed, methodical and well-reasoned examination of the law of contracts and the limits on lost profits damages. While the law specifies that damages must be reasonably certain, the law cannot and does not draw a line demarcating the degree of certainty required by the idiosyncrasies of each case.

Where a motion in limine to exclude damages is the issue, the task of determining the threshold measure of certainty to permit Skorheim's opinion to go to the jury should be left to the gatekeeping function of the trial court, in the context of its evidentiary rulings after an evaluation of all of the facts, evidence, and arguments. Here, the trial court drew a very reasonable line in the sand with its ruling excluding Sargon's evidence of lost profit damages. I see no justification for this court to overturn that decision.

At the conclusion of the Evidence Code section 402 hearing, the trial court found that Skorheim's testimony "leaves the determination of up to a billion dollars of lost profit damages to pure speculation," and granted defendants' motion. The court found Skorheim's opinion was not based on Sargon's historical profits or those of a similar business; Skorheim used assumptions that had no reasonable factual foundation; he gave

an opinion beyond his level and area of expertise; and there was no California legal authority supporting market share lost profits.

As the majority opinion sets forth, the court reasoned as follows:

"[A]n established business may generally recover for lost profits because their extent may be ascertained with reasonable certainty from the company's past volume of business and other provable data relevant to future sales. Lost profits may be established with expert testimony and be based on economic and financial data, market surveys and analysis, business records of similar enterprises, but there must be a similarity between the facts forming the basis of the profit project and the business opportunity destroyed. (*Kids' Universe v. In2Labs*, *supra*, 95 Cal.App.4th at p. 885.) If a lost profits analysis contains a comparison to other businesses, those businesses must be similar. (*Parlour Enterprises, Inc. v. Kirin Group, Inc.* (2007) 152 Cal.App.4th 281, 288 (*Parlour Enterprises*).)" (Maj. opn. *ante*, at p. 27.)

"The trial court concluded Sargon relied on data that was not analogous to Sargon's business. Skorheim used industry leaders, all multi-million and multi-billion dollar international companies. '*The only thing these established companies have in common with [Sargon] is that they all sell or make dental implants. In all other respects, in areas the MRG report deems relevant, such as size, history, product line, sales force, access to financing, among others, they are worlds apart from Sargon*.'" (Maj. opn. *ante*, at p. 27, italics added.)[1] At the Evidence Code section 402 hearing, Skorheim could not identify any other business metric Sargon had in common with the industry leaders other than the three drivers. For example, while Sargon had a five percent profit in 1997, he used Nobel Biocare and Straumann's profits, which were at 30 percent.

"As a result, Skorheim's 'projections are wildly beyond, by degrees of magnitude, anything Sargon has ever experienced in the past. Under the 20% market share scenario, for example, [Sargon] would see its profits climb by 534.4% the first year, and by over

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[1] Although initially Skorheim had deemed Sargon's past performance irrelevant, during the hearing Skorheim indicated that his damages analysis could be based upon Sargon's sales and profit during 1998.

157,000% by 2009.'" (Maj. opn. *ante*, at p. 27.) Thus, Sargon was not similar to the Big Six under any relevant, objective business measure.

"The court also found that comparison of '"degrees of innovation"' failed to give the jury standards from which it could make a rational decision, and was inherently speculative and subjective. Although the ranking of innovativeness among the market leaders was central to Skorheim's opinion, he had inexplicably testified he did not know how the market leaders compared to each other, and refused to give an opinion on the issue. Ultimately, the only evidentiary support for the percentage market share scenarios came from Skorheim's observations of the marketplace, and his conclusion that innovative products generated more sales. To the court, this was nothing more than a tautology." (Maj. opn. *ante*, at p. 28.)

"The court also found Skorheim lacked expertise in the dental industry, and therefore his opinion was pure speculation. Skorheim did nothing more than read the lay press and conduct informal interviews. Finally, the court found Skorheim's opinion was based upon speculative assumptions, including a series of successful clinical tests, marketing efforts, research and development, training of dentists, and relationships with universities; Skorheim believed 'by 2007 Sargon would have made the seamless transition from a three-person operation to sharing industry leadership with Nobel Biocare, a multi-million dollar international corporation.'" (Maj. opn. *ante*, at p. 28.)

There is nothing in this ruling that indicates the trial court acted in an arbitrary, capricious fashion, was guided by whim rather than the rule of law, or exceeded the bounds of reason.

IV.

In spite of the trial court's well-reasoned and sound exercise of its discretion within the boundaries of certainty described by the case law, the majority asserts "Sargon has the better argument here," and concludes "*Palm Medical Group* [*, Inc. v. State Comp. Ins. Fund* (2008) 161 Cal.App.4th 206] is more on point than *Parlour Enterprises* [*, supra*, 152 Cal.App.4th 281]," drawing its own line in the sand. (Maj. opn. *ante*, at p. 30.) In so doing, the majority concedes my point: under the abuse of discretion

standard, it was for the trial court to determine "who had the better argument." This determination of whether *Palm Medical Group* or *Parlour Enterprises* governed the exclusion of the methodology used here was properly left to the trial court under the abuse of discretion standard because those cases defined the scope of the discretion vested in the trial court, not the precise position where the line is to be drawn. As explained in Rosenberg, *Appellate Review of Trial Court Discretion*, *supra*, 79 F.R.D. at p. 181, here in the realm of lost profits damages there are many factual variables and some signposts, but the landscape has not hardened into one concrete rule of law compelling one result or another. By ignoring the function of discretion in trial court evidentiary rulings, the majority apparently applies a de novo standard of review to what is unmistakably an abuse of discretion standard, and usurps the function of the trial court where the facts of the case do not justify such interposition.

Furthermore, while I admittedly share with the trial court a healthy dose of skepticism over Skorheim's unyieldingly optimistic projections for Sargon's market share growth and while I struggle to see a nexus between those projections and business and economic reality, this dissent nonetheless does not stem from the havoc that Skorheim's methodology may wreak upon reasonable damage calculations but from the damage done to the trial judge's reasonable and prudently exercised judgment on an evidentiary issue over which he and he alone should have decisional authority, absent arbitrariness and capriciousness. Nothing in the trial judge's reasonable, straightforward and clearly articulated evidentiary ruling bears even a smidgeon of arbitrariness or capriciousness.[2]

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[2] Indeed, the trial court even considered permitting Sargon to put on evidence about the market share of AstraTech, the smallest comparator company. After careful consideration, the court however concluded that even AstraTech was too dissimilar to Sargon to warrant admission of Skorheim's testimony concerning its market share. The court stated there was a problem with the "'beauty contest'" aspect of the comparison because it required too many assumptions to be made and gave the jury no standards. (Maj. opn. *ante*, at p. 26.) The majority, however, asserts that AstraTech was "sufficiently similar" to Sargon, and Skorheim's testimony regarding AstraTech was supported by "substantial evidence, not speculation." (Maj. opn. *ante*, at p. 30.) This

Consequently, because the quantum of certainty required to establish lost profit damages varies greatly from case to case, the majority has found an abuse of discretion and substituted its judgment for that of the trial court. However, it is precisely because the standard of review tolerates this variation in the case law in permitting a trial court to choose among possible rulings within the confines of the law that the path the majority takes today dangerously erodes the function of the trial court in making evidentiary rulings on lost profit damages.

As another state's supreme court has summarized, "[w]here . . . the exercise of discretion turns upon a factual determination made by the trier of the facts, an abuse of discretion *involves far more than a difference in judicial opinion between the trial and appellate courts*. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." (*Spalding v. Spalding* (Mich. 1959) 94 N.W.2d 810, 811–812, italics added.) The case before us exposes the need for a clear statement from our Supreme Court to render guidance to trial and appellate courts as to the role of discretion in evidentiary rulings regarding the necessary measure of proof to establish lost profit damages. Where, as here, an expert testifies using a methodology not previously sanctioned by any court to calculate lost profits for an unestablished business, the trial court's discretion to exclude evidence it deems speculative should not be disturbed on appeal.

The trial court did not commit legal error. Absent arbitrariness and capriciousness, the trial court's evidentiary ruling regarding the admissibility of expert

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dissent reiterates such a determination is the province of the trial judge, not the appellate court.

testimony—not the de novo ruling of the appellate court—should govern this case. I would affirm the ruling of the trial court excluding Skorheim's expert testimony.

JOHNSON, J.