

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

MEDIVATION, INC. et al.,
Plaintiffs and Appellants,

v.

ARAGON PHARMACEUTICALS, INC.,
Defendant and Respondent.

A138405 & A139096

(San Francisco City & County
Super. Ct. No. CGC-11-510715)

MEDIVATION, INC. et al.,
Plaintiffs, Cross-Defendants and
Appellants,

v.

THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA,

Defendant, Cross-Complainant and
Respondent;

MICHAEL E. JUNG,

Defendant and Respondent;

ARAGON PHARMACEUTICALS, INC.,

Defendant and Respondent.

A141193 & A142480

(San Francisco County
Super. Ct. No. CGC-11-510715)

I.

INTRODUCTION

These consolidated appeals arise out of a dispute over licensing rights to certain molecular compounds developed for the potential treatment of prostate cancer, which we refer to as the “A-series” molecules. Medivation, Inc. and its wholly owned subsidiary

Medivation Prostate Therapeutics, Inc. (Medivation) contend that The Regents of the University of California (The Regents) granted Medivation a license to develop and market the A-series molecules in 2005, when it granted Medivation a license to a different set of molecules that were also developed as a potential cancer treatment, which we refer to as the “RD-series” molecules. The Regents maintain that the A-series molecules were not covered by any agreement it had with Medivation, but rather were licensed to Aragon Pharmaceuticals, Inc. (Aragon) in 2009.

Medivation filed the underlying action against several parties who allegedly deprived it of rights to the A-series molecules. In addition to filing claims against The Regents and Aragon, Medivation sued Dr. Michael E. Jung, a University of California Los Angeles (UCLA) professor who headed the research lab where the RD-series and the A-series molecules were invented. Medivation alleged that Jung’s activities relating to the development of these two series of molecules constituted actionable fraud and also violated contracts that Jung executed with Medivation in 2006 and 2007. The Regents and Aragon filed their own claims to confirm their respective rights to the A-series molecules. In addition, The Regents sought declaratory relief regarding a collateral dispute with Medivation regarding the scope of The Regents’ contract right to a percentage of income that Medivation stood to earn under a sublicense agreement that it had executed in 2009 in order to commercialize and market one of the molecules in the RD-series as a treatment for prostate cancer.

All told, these claims were resolved by two summary judgment orders, a jury trial and a court trial. In the end, Medivation failed to prove any of its claims against The Regents or Aragon; a jury exonerated Jung of fraud, but found that he breached a 2006 stock option agreement which caused Medivation damages in the amount of \$406,917.50; and the trial court granted The Regents declaratory relief regarding its right to a percentage of Medivation’s sublicensing income.

In these consolidated appeals, Medivation contends that the trial court made multiple errors requiring reversal of three judgments, as well as postjudgment orders

granting Aragon its costs of suit and The Regents its attorney fees. We affirm the judgments and postjudgment orders.

II.

BACKGROUND

A. Agreements between Medivation and The Regents

On August 12, 2005, Medivation and The Regents executed an Exclusive License Agreement (ELA), pursuant to which The Regents granted Medivation a license to certain patented rights in inventions that were “generally characterized as ‘Preparation and Activity of Novel Prostate Cancer Drugs’ ” in two patent cases that The Regents had filed. The inventions were made during research conducted at UCLA by Dr. Jung and other employees of The Regents, and by Dr. Charles Sawyers, who was an employee of the Howard Hughes Medical Institute and a faculty member at UCLA.

The patent rights that were licensed to Medivation were described in a “Grant” provision which conferred “an exclusive license . . . under Regents’ Patent Rights, in jurisdictions where Regents’ Patent Rights exist, to make, have made, use, sell, offer for sale and import Licensed Products and to practice Licensed Methods in the Field of Use to the extent permitted by law.” The ELA defined the “Regents’ Patent Rights” as The Regents’ interest in patent claims “based on the patent applications listed in Appendix A” of the ELA. Appendix A, which was also titled “REGENTS’ PATENT RIGHTS,” listed two patent cases that The Regents had filed: UC Case No. 2004-129, which was a “PCT Patent Application”¹ filed in February 2005 that was based on a US Provisional Patent

¹ A PCT Application is an international application filed under the provisions of the Patent Cooperation Treaty (PCT), which is “an international agreement allowing inventors to streamline the process of obtaining patent rights across multiple member nations. [Citation.]” (*Helfgott v. Karas, P.C. v. Dickenson* (2000) 209 F.3d 1328, 1330.) The PCT Application entitles its holder to a preliminary examination by an international authority and a nonbinding opinion regarding the patentability of the invention disclosed in the application. It also gives the holder a 10-month period for pursuing national applications in participating jurisdictions. The PCT Application by itself does not confer a patent right in the subject invention(s). (*Ibid.*; see 35 U.S.C. §§ 351 et seq.)

Application that was filed in February 2004; and UC Case No. 2005-438, which was a US Provisional Patent Application filed in May 2005.

By executing the ELA, Medivation agreed to “diligently proceed with the development, manufacture and sale (‘Commercialization’) of Licensed Products” and to “earnestly and diligently endeavor to market them within a reasonable time” Medivation also agreed to pay The Regents specified sums, including license fees, an earned royalty of 4 percent of net sales of licensed products, and 10 percent of any sublicensing income if Medivation elected to sublicense its rights under the ELA. The ELA provided that sublicensing income included “milestone payments, and the like,” but that it did not include “royalt[y]” payments made to Medivation by a sublicensee.

In August 2005, The Regents entered into a separate agreement with Medivation on behalf of its Los Angeles Campus, which the parties refer to as the Sponsored Research Agreement or “SRA.” Material provisions of the SRA required Medivation to pay \$154,500 to sponsor research that would be performed at UCLA “under the direction of Michael E. Jung, Principal Investigator.”

By executing the SRA, The Regents agreed to use its “best effort” to perform work under the Agreement, which was described in a “Statement of Work” attached as Exhibit A to the SRA. That Statement of Work was authored by Jung, who proposed to “prepare and test several new analogues of the diaryl thiohydantoin series as well as other similar chemical structures” in order to identify molecules with improved “pharmacokinetic properties.” The work was to be performed in Jung’s UCLA lab, but in collaboration with Sawyers and his team. The SRA required The Regents to provide Medivation with a “final technical report” upon conclusion of the work, and to give Medivation the opportunity to negotiate a license to “Subject Inventions,” which were defined in the SRA as inventions or discoveries “first conceived and actually reduced to practice under this Agreement.”

The SRA further provided that “[w]ork under this Agreement will be performed during the period of 11/01, 2005 through 10/31, 2006.” The SRA was subsequently amended to extend this performance period to December 31, 2007.

The ELA was amended several times. The “First Amendment,” which was executed five days after commencement of the performance period for work under the SRA, amended the ELA definition of Regents’ Patent Rights and Appendix A to add a new patent case, UC Case No 2006-260, which pertained to a US Provisional Patent Application The Regents intended to file. Appendix A was also amended to incorporate an Exhibit A, which set forth visual diagrams of the specific molecules that were covered by the patent applications in the three cases referenced in Appendix A. The structures depicted on Exhibit A were all molecules in the RD-series and were separately identified as RD1 through RD163 and RD168. The parties executed subsequent amendments to the ELA in May 2006 and July 2007, each time for the purpose of expanding the ELA’s definition of Regents’ Patent Rights to include additional molecules in the RD-series that had been created during sponsored work under the SRA and identified in new patent applications filed by The Regents.

On October 21, 2009, the parties executed a final amendment to the ELA which stated that Medivation intended to grant an exclusive sublicense under the ELA, and amended various provisions of the agreement to clarify the rights of a designated sublicensee. The following week Medivation executed a sublicense agreement with Astellas Pharma, Inc. (the Astellas Agreement), for the stated purpose of establishing a “broad, worldwide, strategic collaboration” directed at the commercialization of one of the RD-series molecules. In exchange for a sublicense of those molecules, Astellas agreed to pay Medivation an upfront license fee of \$110 million, and additional substantial sums during the course of the collaboration, including the payment of regulatory milestones, sales milestones and royalties. Astellas’s obligation to make sales milestone payments, which was tied to aggregate net sales in a given calendar year, was capped at \$320 million.

On October 26, 2009, Medivation’s chief banking officer (CBO) and chief financial officer (CFO), Patrick Machado, wrote a letter to The Regents’ director of licensing, Emily Loughran, regarding a telephone discussion they had about the meaning of a provision in the Astellas Agreement. Specifically, Machado wrote to confirm their

“mutual agreement” that “sales milestones” payments owed to Medivation under the Astellas Agreement were actually deferred royalty payments, and, therefore, did not constitute sublicensing income under the ELA. Loughran indicated that Machado had correctly summarized their agreement by signing his October 26, 2009 letter (the 2009 Side Letter).

B. Agreements between Medivation and Jung

In February 2006, Jung accepted an appointment to Medivation’s Scientific Advisory Board (SAB) and signed an agreement which gave him the option to acquire 25,000 shares of Medivation stock (the 2006 Stock Option Agreement). By signing the 2006 Stock Option Agreement, Jung agreed to “render faithful and efficient services to the Company.”

C. The Regents’ Agreement with Aragon

On May 18, 2009, The Regents executed an “Exclusive License Agreement” with Aragon’s predecessor in interest, Farallon, Inc. (the Aragon Agreement). The inventions covered by the Aragon Agreement were “generally characterized as ‘Preparation and Activity of Novel Prostate Cancer Drugs (“A51/A52”)’ ” in a 2006 patent case filed by The Regents. (Italics omitted.) The inventions were made during research conducted at UCLA by Jung and Sawyers. The Aragon Agreement granted an exclusive license to The Regents’ patents rights in patent applications claiming interests in the structures of the A-series molecules that became the subject of this litigation.

III.

PROCEDURAL HISTORY

A. Medivation’s Complaint

In 2011, Medivation filed a complaint against The Regents, Jung, and Sawyers, seeking damages and equitable relief for breach of contract and fraud. Aragon intervened in the action to establish its rights to the A-series molecules. Medivation’s operative

pleading, a February 2012 second amended complaint (the SAC), alleged 13 causes of action against one or more of the three respondents in these consolidated appeals.²

1. *Factual Allegations*

Medivation alleged that it executed the ELA and the SRA in order to secure rights to a class of molecules called “diaryl thiohydantoin” which could potentially treat refractory prostate cancer. These molecules were created by Jung and Sawyers, using Sawyers’s “pioneering discovery about what makes certain prostate cancers resistant to treatment.” The most “promising lead molecule” that the team discovered was called RD37, but it was not sufficiently effective to qualify for clinical testing. Therefore, in April 2005, The Regents approached Medivation, a small startup company founded by a former colleague of Sawyers’s, and inquired about a collaboration “to develop the best compound” for treating refractory prostate cancer.

According to the SAC, The Regents proposed to grant Medivation a broad license to its “RD project,” identifying the RD-series as the molecules that were developed using Sawyers’s pioneering methods. “Medivation sought a license for all compounds in the RD series and all analogs to those compounds developed using Dr. Sawyers’s screening methods.” Relying on assurances from The Regents and Jung that they would not conceal information about these molecules, Medivation executed the ELA, the SRA, and their respective amendments. During the subsequent “research collaboration spanning almost three years,” The Regents disclosed to Medivation approximately 180 molecules in the RD-series representing a variety of structures. Believing that The Regents and Jung had disclosed all pertinent discoveries resulting from the collaboration, Medivation eventually selected a molecule called RD162-prime as “the most promising molecule, and the candidate it would seek to develop commercially.”³

² Medivation’s claims against Sawyers are not at issue.

³ RD162-prime is often written as “RD162’.” During the events pertinent to this litigation, RD162-prime was renamed MDV3011, and was renamed again when it was commercialized as Xtandi. Here, we use the name RD162-prime whenever practicable.

However, Medivation alleged, Jung actively concealed the existence of a “diaryl thiohydantoin” molecule called A51, which was a “near-identical analog of RD37,” one of the RD-series molecules licensed to Medivation under the ELA. Jung and his lab associate Dr. Samedy Ouk “synthesized and tested” A51 “a few months before contacting Medivation in 2005.” Medivation further alleged that its license under the ELA was sufficiently broad to cover A51 and that “A51 fell squarely within the scope of research Dr. Jung agreed to perform for Medivation, and the class of compounds Dr. Jung agreed to disclose to Medivation” under the SRA.

Medivation alleged that Jung concealed A51 because he “sought to pursue A51 and other ‘A series’ molecules in parallel with Medivation’s funded work on the RD molecules.” That way, he and Sawyers could gain free access to the RD-series research and testing and leverage Medivation’s anticipated success to form their own company with the A-series molecules. To facilitate his plan, Jung allegedly concealed and/or made false statements about research which could have proved useful for the development of the RD-series molecules licensed to Medivation.

In addition, Jung allegedly persuaded Medivation to purchase expensive equipment which he used to develop, test and validate A52, the second molecule in the A-series after A51. Jung also convinced Medivation to appoint him to Medivation’s SAB so he could monitor Medivation’s progress, and acquire access to proprietary information.

Medivation alleged that The Regents concealed its interests in both of the A-series molecules from Medivation by failing to disclose a March 27, 2006 patent application covering the structures of the A-series molecules, and by misleading Medivation about the scope of a March 29, 2006 patent application which covered the RD-series molecules. Meanwhile, Jung continued to use Medivation’s confidential information to speed the development of A52 by becoming a consultant for Medivation in 2007.

In late 2007, Jung and Sawyers allegedly began to seek investors to fund a new company to commercialize A52. They took advantage of Medivation’s funded work under the SRA, benefited from the commercialization of RD162-prime, and used

Medivation's confidential information to create their new company, which was named Aragon. In May 2009, Aragon obtained a "purported" license of A52 and, shortly thereafter, Jung resigned from Medivation's SAB, and cashed out his Medivation stock options, "netting him over \$400,000."

Medivation alleged that it did not discover the true facts about defendants' conduct until 2011, when The Regents' patent application claiming interests in the A-series molecules was published. Medivation subsequently discovered that the structure of A52 was "nearly identical" to RD162-prime and that The Regents had filed its first patent application claiming an interest in A52 in March 2006, during the SRA's performance period. At that point, Medivation understood that Jung and Sawyers "founded Aragon to compete with Medivation by developing A52 to treat refractory prostate cancer, that The Regents had breached its agreements and that Aragon had purportedly licensed A52."

2. Medivation's Causes of Action

Medivation alleged three contract-based causes of action against The Regents: (1) breach of the SRA by failing to disclose the A-series molecules so Medivation could exercise its option to license them; (2) breach of the ELA by "licensing rights to A51 and A52 to Aragon, despite having already granted [Medivation] exclusive rights to the same"; and (3) breach the implied covenant of good faith and fair dealing by making disclosures about the RD-series technology to Aragon.

Medivation also sought declaratory relief against The Regents and Aragon to establish that the ELA and/or the SRA granted Medivation exclusive rights to the A-series molecules, that Aragon did not possess exclusive rights to those molecules, and that "any agreements purporting to grant those rights to Aragon are void and/or unenforceable."

Medivation alleged separate claims against Aragon for intentionally inducing breach of contract and intentionally interfering with contractual relations, based on the theory that Aragon knew about the ELA when it sought and obtained license rights to the A-series molecules.

In a cause of action against Jung and Aragon for conversion, Medivation alleged that it held an exclusive license of the rights to possess and to commercialize the A-series molecules; Jung “disposed” of those molecules in a manner that was inconsistent with Medivation’s ownership; and Aragon wrongfully asserted dominion over the A-series molecules in a manner inconsistent with Medivation’s rights and ownership.

Jung was named in additional claims for breach of contract and fraud. Medivation alleged that Jung breached the 2006 Stock Option Agreement, and subsequent consulting and nondisclosure agreements that he executed in 2007. Medivation’s fraud claims against Jung were based on theories of fraudulent inducement to enter the ELA and fraudulent misrepresentations during the period that Jung conducted research under the SRA on behalf of Medivation.

B. The Regents’ Cross-Complaint

The Regents sought judicial declarations that neither the ELA nor the SRA grant Medivation a license to The Regents’ patent rights to the A-series molecules, or a first right to negotiate an option or license to those molecules. The Regents also sought declaratory relief to resolve a dispute with Medivation about whether sales milestone payments under the Astellas Agreement constitute sublicensing income under the ELA. This cause of action was supported by the following factual allegations:

In 2009, Medivation began looking for a partner to develop and commercialize RD162-prime as a treatment for prostate cancer. By October 9, Medivation and Astellas had reached agreement on the key financial terms of a sublicensing agreement. Before that contract was finalized, Medivation’s CBO and CFO, Patrick Machado, made several false representations to The Regents regarding payments Medivation expected to receive under the Astellas Agreement.

Machado allegedly told The Regents that Medivation and Astellas had structured the Astellas Agreement so that royalty payments that would become due some time in the future were characterized as sales milestone payments. Machado explained that describing the royalties as milestones would allow Medivation and Astellas to impress the public with their collaboration by issuing press releases boasting about high milestone

payments. Machado allegedly made assurances that this payment structure would not affect Medivation's total income under the Astellas Agreement or the amount of sublicensing income that Medivation would pay The Regents under the ELA. However, Machado said that Medivation could not close the deal with Astellas unless The Regents provided a "side letter" acknowledging that sales milestone payments under the Astellas Agreement did not constitute sublicensing income under the ELA.

The Regents alleged that its representative signed the 2009 Side Letter in reliance on Machado's representations regarding the characterization of sales milestone payments in the Astellas Agreement and the effect of the 2009 Side Letter. However, The Regents subsequently learned that, contrary to Machado's representations, sales milestone payments were not structured or defined as deferred royalty payments. Rather, The Regents alleged, sales milestone payments described in the Astellas Agreement fall squarely within the definition of sublicensing income under the ELA.

The Regents alleged that the ELA entitled The Regents to 10 percent of all sales milestone payments under the Astellas Agreement, and that its share of those payments could ultimately be as much as \$32 million. However, Medivation had taken the position that The Regents were not entitled to any part of those sales milestone payments because the 2009 Side Letter reclassified them as not constituting sublicense income. Thus, The Regents sought a judicial declaration that the 2009 Side Letter was obtained by fraud, and that sales milestone payments under the Astellas Agreement constitute sublicensing income under the ELA.

C. Summary Judgment Orders

On December 20, 2012, the trial court granted in part and denied in part separate motions for summary judgment filed by The Regents and Aragon. The court granted both defendants summary adjudication of causes of action or parts of causes of action in the SAC which were predicated on Medivation's claim that it acquired exclusive rights to the A-series molecules under the ELA and/or the SRA. The court also granted these defendants summary adjudication of their respective claims for declaratory relief with respect to A-series molecules.

The December 2012 order was supported by several express findings, including: (1) The “SRA and the ELA are fully integrated agreements (i.e., they are the complete and final expression of the agreements between Medivation and The Regents) and subject to the parol evidence rule.” (2) ”Medivation obtained no rights to the A-series compounds from the ELA.” (3) The “fact that The Regents subsequently licensed the A-series compounds to Aragon does not constitute a breach of the ELA.” (4) The SRA did not require The Regents to disclose Jung’s discovery of the A-series molecules. (5) ”Medivation has no rights to the A-series compounds under the ELA, the SRA, or both.” (6) Aragon “has exclusive rights to the A-series compounds under its separate contract with The Regents.”

On January 25, 2013, the trial court ruled on another set of motions for summary judgment or summary adjudication that had been filed by Aragon, The Regents, and Jung. The court granted The Regents and Aragon summary adjudication on the remaining claims against them after finding that there was insufficient evidence to raise a triable issue of material fact that Medivation suffered cognizable damages.

In its January 2013 order, the court also granted Jung summary adjudication of Medivation’s conversion claim, stating: “Since Medivation has no rights to the A-series compounds, any actions Jung may have taken regarding the A-series could not have constituted conversion of Medivation’s property as a matter of law.” However, the court denied Jung summary adjudication of causes of action alleging “a variety of misrepresentations, omissions, or half-truths concerning the research being performed in [Jung’s] laboratory.” The court found that a “smorgasbord” of material issues of disputed facts precluded summary adjudication.

On February 15, 2013, the trial court entered judgment in favor of Aragon on all of Medivation’s claims and on Aragon’s complaint in intervention (the Aragon Judgment). The Aragon Judgment states that “Aragon’s May 18, 2009 Exclusive License Agreement with The Regents of the University of California is a valid and binding contract that provides Aragon with the exclusive right to develop and commercialize the

A51 and A52 compounds (the ‘A-series Compounds’),” and that “Medivation has no rights in or to the A-series compounds.”

D. Court Trial

A July 2013 court trial was conducted to resolve The Regents’ cross-claim for declaratory relief regarding its right to sublicensing income under the ELA. In a December 20, 2013 “Final Statement of Decision,” the trial court found, among other things, that “(1) The Regents [are] entitled to 10 percent of any sales milestone payments made by Astellas to Medivation under the [Astellas Agreement]; and (2) the [2009] Side Letter is of no legal effect because of fraud, mistake, and lack of consideration.”

On January 15, 2014, the trial court filed a judgment in favor of The Regents on all of Medivation’s causes of action and on all of The Regents’ cross-claims (The Regents’ Judgment).

E. Jury Trial

Meanwhile, an October 2013 jury trial was conducted to resolve Medivation’s remaining claims against Jung. Prior to trial, the court severed claims against Jung for breach of the 2007 consultation and nondisclosure agreements, and fraud arising out those agreements, and referred the severed claims to binding arbitration. Thus, the jury trial was limited to Medivation’s claims that Jung breached the 2006 Stock Option Agreement, and that he committed fraud by making false representations which induced Medivation to enter into the ELA and SRA and to continue its collaboration with The Regents for several years.

On November 15, 2013, the jury found that Jung did not commit fraud, but that he did breach the 2006 Stock Agreement and was liable to Medivation for damages in the amount of \$406,917.50. On November 22, the court entered judgment on Medivation’s causes of action against Jung (the Jung Judgment). The court entered judgment in favor of Jung on Medivation’s causes of action for conversion and fraud, and in favor of Medivation on the cause of action for breach of the 2006 Stock Option Agreement. Medivation filed a voluntary dismissal of the remaining claims against Jung that had been referred to arbitration.

F. The Consolidated Appeals

In Case No. A138405, Medivation appealed from the Aragon Judgment. In Case No. A139096, Medivation separately appealed postjudgment orders requiring it to pay Aragon costs in the amount of \$193,865.72. In Case No. A141193, Medivation appealed from The Regents' Judgment and the Jung Judgment. Jung filed a cross-appeal in Case No. A141193, which he subsequently abandoned. In Case No. A142480, Medivation appealed from postjudgment orders requiring it to pay The Regents' attorney fees in the amount of \$3,772,783.80.

Three sets of claims frame our discussion of these consolidated appeals. First, we address the summary judgment rulings. Medivation contends that the Aragon Judgment, The Regents' Judgment and the Jung Judgment must be reversed because they are all predicated on erroneous summary judgment rulings. Second, we consider the part of the Jung Judgment exonerating Jung of fraud. Medivation contends it is entitled to a retrial of the fraud claim because the court erroneously excluded evidence and made an instructional error which affected the jury verdict. Finally, we address the part of The Regents' Judgment granting it declaratory relief regarding its right to sublicensing income under the ELA.⁴

IV.

THE SUMMARY JUDGMENT ORDERS

“On review of an order summarily adjudicating issues, we review the record de novo to determine whether the prevailing party has conclusively negated necessary elements of his opponent's case or demonstrated under no hypothesis is there a material issue of fact which requires the process of a trial.” (*Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1350, fn. omitted (*Wolf*)). The trial court's stated reasons for granting

⁴ We will not separately address the postjudgment cost award to Aragon or attorney fee award to The Regents because Medivation does not make any independent claims with respect to these orders, but only seeks their reversal in conjunction with the judgments to which they relate.

summary adjudication are not binding on us because we review the court’s rulings, not its rationale. (*Kids’ Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.)

A. The December 2012 Order

1. Issues Presented

Medivation challenges the trial court’s findings on summary adjudication that: (1) Medivation did not secure a license to the A-series molecules under the ELA; (2) the SRA did not require The Regents to disclose the A-series molecules to Medivation; and (3) the SRA did not give Medivation the right to license the A-series molecules.

Medivation contends summary adjudication of these issues should have been denied because (1) the ELA and the SRA can both be interpreted as conferring rights in the A-series molecules to Medivation, and (2) Medivation produced substantial evidence to support that allegedly reasonable interpretation of the two contracts.

The threshold question raised by these claims is whether each “contract is ambiguous—that is, reasonably susceptible to more than one interpretation. [Citation.] The question of ambiguity is a question of law subject to independent review on appeal. [Citation.] [¶] The analysis of ambiguity is not necessarily limited to the words of the contract. Trial courts are required to receive provisionally any proffered extrinsic evidence that is relevant to show whether the contractual language is reasonably susceptible to a particular meaning. [Citation.] Such extrinsic evidence might expose a latent ambiguity when the contract appears unambiguous on its face. [Citation.]” (*Scheenstra v. California Dairies, Inc.* (2013) 213 Cal.App.4th 370, 389 (*Scheenstra*).

“If the court determines there is no ambiguity—that is, the language is reasonably susceptible to only one interpretation—then the judicial inquiry into meaning is finished and the clear and explicit meaning governs. [Citations.] When no ambiguity exists, the last step for the court is to apply that clear meaning to the facts of the case.” (*Scheenstra, supra*, 213 Cal.App.4th at p. 390.)

In conducting our independent review of the trial court’s conclusions that the ELA and the SRA are not ambiguous, we look “first to the language of the agreement itself to discern the parties’ intent.” (*Ram’s Gate Winery, LLC v. Roche* (2015) 235 Cal.App.4th

1071, 1082.) We consider that language in accordance with settled principles of contract interpretation: “ ‘The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.’ [Citation.] ‘Such intent is to be inferred, if possible, solely from the written provisions of the contract.’ [Citations.] ‘If contractual language is clear and explicit, it governs.’ [Citation.]” (*State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186, 195 (*Continental Ins.*); see also Civ. Code, §§ 1636, 1638, 1639.) “It is the outward expression of the agreement, rather than a party’s unexpressed intention, which the court will enforce. [Citation.]” (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1166.)

2. The ELA

Medivation contends that the ELA can reasonably be construed as granting Medivation an exclusive license to the entire family of diaryl thiohydantoin molecules that were in the process of being developed by using Sawyers’s pioneering methodology.

As a preliminary matter, we find it useful to clarify how Sawyers’s assays were used to “develop” the molecules at issue in this litigation because Medivation’s use of that verb is sometimes misleading. According to the SAC allegations and the evidence, Sawyers’s assays are screening methods that are applied to a molecule to test its qualities. Thus, the assays are not used by a scientist to actually create a certain type of molecule, but rather can be applied to any molecule after it is created in order to determine whether it possesses certain desired qualities. Medivation’s theory then is that it acquired a license to every diaryl thiohydantoin molecule created in Jung’s lab that was tested with Sawyers’s assays.

a. The Contract Terms

The granting provisions of the ELA appear in Section 2 of the agreement, which is titled “**Grant.**” (Original boldface.) Paragraph 2.1, as amended, states, in pertinent part: “The Regents hereby grants to [Medivation] an exclusive license (the ‘License’) under Regents’ Patent Rights, in jurisdictions where Regents’ Patent Rights exist, to make, have made, use, sell, offer for sale and import Licensed Products and to practice Licensed Methods in the Field of Use to the extent permitted by law.”

This Grant clause contains several defined terms which delineate the scope of the granted license. Paragraph 1.1, as amended by the parties, states: “ ‘**Regents’ Patent Rights**’ means The Regents’ interest in the claims of the United States patents and patent applications, corresponding foreign patents and patent applications (requested under Paragraph 7.3 herein), and any reissues, extensions, substitutions, continuations, divisions, and continuation-in-part applications . . . *based on* the patent applications listed in Appendix A (UC Case Nos. 2003-279-2, 2004-129, 2005-438, 2006-260, 2006-537 and 2007-139.)” (Original boldface, italics added.)

Paragraph 1.2 defines “**Licensed Product**” as “any . . . substance . . . covered by the claims of Regents’ Patent Rights or whose manufacture, use or sale would constitute an infringement of any claim within Regents’ Patent Rights.” (Original boldface.)

Paragraph 1.4 defines the “**Field of Use**” as “the treatment or prevention of disease using the compositions of matter with the chemical structures identified in Regents’ Patent Rights; provided however, that The Regents will retain the right to provide such compounds included within the subject technology to third parties for commercial research use only as positive controls in drug discovery assays.” (Original boldface.)

Each of these defined contract terms contains limiting language which circumscribes the scope of the license granted under Paragraph 2.1. Paragraph 1.1 limits the rights conveyed by the license to interests claimed by The Regents in United States patents and corresponding foreign patents that are based on the applications listed in Appendix A. Paragraph 1.2 limits the products covered by the license to substances with respect to which The Regents claim an interest based on the patent applications listed in Appendix A. And, Paragraph 1.4 limits the use of The Regents’ Patent Rights to “the treatment or prevention of disease using the compositions of matter with the chemical structures identified in” the patent applications listed in Appendix A.

These express contract terms unambiguously granted Medivation a license to The Regents’ patent interests in chemical structures that were identified in one or more of the patent applications listed in Appendix A. This straightforward interpretation of the ELA is reinforced by Paragraph 17.4d, which states: “Nothing in this Agreement will be

construed as: . . . [c]onferring by implication, estoppel or otherwise any license or rights under any patents of The Regents other than Regents' Patent Rights as defined herein, regardless of whether such patents are dominant or subordinate to Regents' Patent Rights.”

This interpretation of the granting provisions of the ELA is also consistent with the first four amendments to the ELA, each of which also amended Appendix A itself, which is subtitled “REGENTS' PATENT RIGHTS.” As reflected in our background summary, the Appendix A that was incorporated into the original ELA listed only two patent cases. Each was identified by specific details, including its filing number and date, UC Case number, and inventors.

The First Amendment made three changes to the ELA which are pertinent to our analysis. First, it amended the ELA's definition of “Regents' Patent Rights” by adding a reference to a third patent case, UC Case No. 2006-260. Second it incorporated a new version of Appendix A. The new Appendix A added details to the descriptions of the two cases that originally comprised The Regents' Patent Rights, which clarified that the patent applications in those two cases “cover[ed] the compounds identified as RD1 through RD138, inclusive, on Exhibit A attached hereto.” The new Appendix A also listed the third patent case, which was a US Provisional Patent Application that The Regents intended to file. The description of that new case stated that “This application will cover only the following diarylthiohydantoin compounds developed in the laboratory of Michael E Jung, the structures of which are set forth on Exhibit A attached hereto:” The specific diaryl thiohydantoin compounds that the parties identified were RD139 through RD142, RD145 through RD163, and RD168. The third relevant change achieved by the First Amendment was the incorporation of an Exhibit A into the new version of Appendix A. The Exhibit A attachment contained visual diagrams of each of the RD-series molecules that had been referenced in Appendix A.

By making these changes to the ELA, the parties clarified their mutual understanding of what chemical structures were identified in the first two patent applications listed on the original Appendix A, and they also explicitly expanded the

scope of the original license by adding a new patent case to the definition of Regents' Patent Rights and specifically identifying the additional molecules that would be covered by that application. Each of the three subsequent amendments to the ELA incorporated new versions of Appendix A, which *expanded* the scope of Medivation's license to cover an additional aspect of a previously licensed product or to cover a specifically identified new invention. Thus, these amendments reflect a mutual intention that Medivation's license did not automatically extend to an evolving family of compounds, but covered only those molecules that were specifically identified in either a patent application listed on Appendix A or in Appendix A itself.

Medivation contends that the grant clause of the ELA is subject to a much broader interpretation which is at least as reasonable as the interpretation summarized above. Their alternative theory hinges on the definition of the word "identified." As noted, Paragraph 1.4 limits the scope of Medivation's license to "compositions of matter with the chemical structures *identified* in Regents' Patent Rights" (Italics added.) Medivation argues that the word "identified" does not mean that the molecules must be graphically "diagramed" in Appendix A, but rather that this term "simply means to indicate or refer to a thing." Employing this definition, Medivation points out that one of the patent applications listed on the original Appendix A, "PCT Patent Application No. US05/05529" (the PCT '529 Application), identified thiohydantoins. Therefore, Medivation posits that the ELA can reasonably be interpreted as conferring a license to "the genus of thiohydantoins identified using Sawyers'[s] assays, including A51 and A52."

On its face, this theory is not tenable. First, Medivation sets up a straw man by disputing whether the compound must be graphically diagramed on Appendix A in order to fall within its license. The question is not whether a molecule was graphically diagramed in Appendix A, but rather whether its chemical structure was identified in one of the pertinent patent applications or on Appendix A itself. Second, since the chemical structure of each molecule is different, so must it be identified distinctly in some way to satisfy the terms of the ELA. Third, defining the scope of Medivation's license based on

a generic reference to thiohydantoin would conflict with the express provision of the ELA which states that Medivation only has rights to “the chemical structures identified in The Regents’ Patent Rights.”⁵

For all these reasons, we disagree with Medivation that the ELA is reasonably susceptible to a broad interpretation under which it acquired a license to an entire and open-ended family of diaryl thiohydantoin molecules. The granting provisions of the ELA, which included several defined contract terms, Paragraph 17.4d of the ELA, and several amendments to Appendix A of the ELA all lead us to the same conclusion: the ELA granted Medivation a license to molecules that were specifically identified by the parties in Appendix A, or in a patent application listed on Appendix A.

b. Medivation’s Extrinsic Evidence

Medivation contends that the trial court erroneously excluded relevant evidence about the negotiations culminating in the ELA, contemporaneous writings of the parties, and the parties’ post-contract course of dealings. According to Medivation, this evidence was admissible to support its “view that it licensed the full family of thiohydantoin being developed in Regents’ labs using Sawyers’[s] assays.”

The parol evidence rule “ ‘generally prohibits the introduction of any extrinsic evidence, whether oral or written, to vary, alter or add to the terms of an integrated written instrument.’ [Citation.]” (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 343 (*Casa Herrera*)). The ELA is, by its express terms, a fully integrated agreement. Paragraph 31.4 states: “This Agreement embodies the entire understanding of the parties and supersedes all previous communications, representations or understandings, either

⁵ By employing this unreasonable interpretation of the grant provision in the ELA, Medivation purports to articulate a disputed issue of fact regarding the scope of The Regents’ Patent Rights under the PTC ‘529 Application. As we discuss below, Medivation’s factual theory is also not supportable.

oral or written, between the parties relating to the subject matter hereof”⁶

Paragraph 31.3 further provides that “No amendment or modification of this Agreement will be valid or binding upon the parties unless made in writing and signed by each party.”

Medivation’s extrinsic evidence was properly excluded pursuant to the parol evidence rule because it was offered to support an interpretation of the ELA which was inconsistent with the express terms of that agreement. “[U]nder the parol evidence rule, all prior or contemporaneous ‘oral negotiations are merged in the written contract, which is conclusive in the absence of a plea of actual fraud or mistake.’ [Citation.] The written agreement supersedes these negotiations and becomes the parties’ sole agreement [citation], and extrinsic evidence may not ‘add to, detract from, or vary the terms of’ that agreement [citation]. As such, the rule ‘applies to any type of contract, and its purpose is to make sure that the parties’ final understanding, deliberately expressed in writing, shall not be changed.’ [Citation.]” (*Casa Herrera, supra*, 32 Cal.4th at p. 345.)

On appeal, Medivation insists that its extrinsic evidence was not offered to vary the actual terms of the ELA, but rather to demonstrate flaws in a contract interpretation which limits the scope of Medivation’s license to molecules identified in Appendix A.

As Medivation contends, the parol evidence rule does not “prohibit the introduction of extrinsic evidence ‘to explain the meaning of a written contract . . . [if] the meaning urged is one to which the written contract terms are reasonably susceptible.’ [Citation.]” (*Casa Herrera, supra*, 32 Cal.4th at p. 343.) “Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible. [Citations.]” (*Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912.)

⁶ The only exception to this integration clause is an April 12, 2005 “Secrecy Agreement” which, according to the ELA language, “shall survive; provided, however, that in the case of any conflict between provisions of the Secrecy Agreement and this Agreement, this Agreement shall govern.”

However, we agree with the trial court that Medivation's extrinsic evidence is legally irrelevant because it does not expose a latent ambiguity in the contract language but instead advocates for a broad license that is not compatible with the language of the contract itself. In light of express contract language circumscribing the scope of the license that The Regents granted, the ELA cannot be reasonably interpreted as conveying a license to the entire family of thiohydantoin molecules that were developed over several years in The Regents' UCLA lab.

c. Summary Adjudication Was Proper

The summary judgment evidence established the following undisputed facts:

(1) The Regents own a patent application that covers the A-series molecules (the A-series patent application); (2) The A-series patent application was not listed in Appendix A of the ELA; (3) "None of the patents or patent applications listed in Appendix A to Medivation's ELA identif[ied] the chemical structure of A51 or A52"; and (4) The A-series molecules were not depicted or identified in any executed version of Appendix A.

Without contesting that these facts are undisputed, Medivation contends there is a triable issue of fact as to whether the A-series molecules fall within the PCT '529 Application that was listed on Appendix A of the ELA. During the summary judgment proceeding, Medivation conceded that the PCT '529 Application "does not identify the chemical structure of A51 or A52." Nevertheless, Medivation argues, as it did below, that the PCT '529 Application makes two claims, Claim 7 and Claim 8, which assert patent rights that necessarily embrace the A-series molecules.

Claim 7 and Claim 8 do not identify any actual molecule by its name or chemical structure, but instead assert an interest in any molecule that, among other things, "inhibits the growth of hormone refractory prostate cancer cells," and "has been previously subjected" to a specifically described method for "examining the physiological effect of said compound on a mammalian prostate cancer cell."

Medivation contends that the methods described in Claims 7 and 8 of the PCT '529 Application are Sawyers's methods, which he and Jung used to develop an entire family of "diaryl thiohydantoin" molecules for the potential treatment of prostate cancer.

Therefore, Medivation reasons, evidence that the A-series molecules are part of that so-called diaryl thiohydantoin family created at least a triable issue as to whether the A-series molecules were licensed to Medivation under the ELA. Indeed, under Medivation's broad reading of the PCT '529 Application, The Regents granted Medivation an exclusive license to the entire family of "diaryl thiohydantoin" molecules, no matter when they were invented, because they were all subjected to the testing methods described in Claims 7 and 8.

Medivation's attempt to manufacture a factual dispute assumes the validity of a contract interpretation which is inconsistent with the clear meaning of the ELA provisions that we have outlined above. Regardless of how broadly we may be willing to construe language in the PCT '529 Application, contract language in the ELA itself limits the scope of Medivation's license to The Regents' Patent Rights in molecules that are actually identified by their chemical structure in the patent applications listed in Appendix A. Evidence that the A-series molecules were also subjected to testing under a methodology referenced in one of those patent applications does not raise a triable issue

of fact as to whether the A-series molecules were themselves specifically identified in any patent application listed in Appendix A.⁷

2. *The SRA*

Medivation contends there are triable issues of material fact as to whether to adopt its interpretation of the SRA, under which The Regents assumed contractual obligations both to disclose and to license the A-series molecules to Medivation.

a. **The Contract Terms**

By executing the SRA, Medivation and The Regents agreed that Medivation would sponsor specific work to be performed by The Regents under Jung's direction, in exchange for certain rights to the fruits of that work. The scope of work covered by the SRA was governed by Jung's "Statement of Work," and by a contract provision specifying a discrete performance period. Initially, that performance period was from November 1, 2005, through October 31, 2006. By amendment, this period was extended to December 31, 2007.

⁷ The Regents challenge Medivation's premise that Claims 7 and 8 gave The Regents a cognizable patent right in any molecule, not to mention the A-series molecules. Although beyond the scope of these appeals, The Regents make a good point. Medivation suggests that Claims 7 and 8 were enforceable "product-by-process" claims to patent rights in a growing family of molecules. "A product-by-process claim is 'one in which the product is defined at least in part in terms of the method or process by which it is made.' [Citation.]" (*SmithKline Beecham Corp. v. Apotex Corp.* (Fed.Cir. 2006) 439 F.3d 1312, 1315.) Here, as discussed above, Sawyers's assays are not used to create compounds, but rather to test their properties. Furthermore, "[r]egardless of how broadly or narrowly one construes a product-by-process claim, it is clear that such claims are always to a product, not a process." (*Id.* at p. 1317.) And, a patent cannot be acquired for a molecule that is not actually described in the claim. (See, e.g., *Regents of University of Cal. v. Eli Lilly & Co.* (Fed.Cir. 1997) 119 F.3d 1559, 1566 ["[A]dequate written description of a DNA . . . 'requires a precise definition, such as by structure, formula, chemical name, or physical properties,' not a mere wish or plan for obtaining the claimed chemical invention. [Citation.]") Here, Claims 7 and 8 do not describe the physical properties or structures of any compounds. Rather they purport to claim a right to any "composition of matter comprising a compound" that exhibits certain properties when subjected to Sawyers's assays for "examining the physiological effect of said compound on a mammalian prostate cancer cell."

Section 9 of the SRA addresses the rights of the parties to discoveries made under the SRA. The first pertinent provision of Section 9 states: “Inventorship of developments or discoveries first conceived and actually reduced to practice under this Agreement (‘Subject Inventions’) will be determined in accordance with U.S. Patent Law.”

Section 9 then provides that rights to Subject Inventions belong to the inventor, or to the inventors in the case of inventions that are made jointly by the parties. Then, Section 9 gives Medivation the following right to negotiate a license to The Regents’ interest in any Subject Invention that either belongs solely to The Regents or belongs jointly to The Regents and Medivation: “To the extent that Sponsor pays all direct and indirect costs of University’s performance hereunder, and to the extent that the University is legally able, Sponsor will be granted a time-limited first right to negotiate an option or license, which may be exclusive, under University’s rights in any Subject Invention that belongs either solely to University or jointly to University and Sponsor.”

Section 9 also expressly requires The Regents to “promptly disclose to Sponsor any Subject Inventions,” and outlines a procedure for negotiating a license of The Regents rights in those Subject Inventions.

The final pertinent provision of Section 9 states: “Nothing contained in this Agreement shall be deemed to grant either directly or by implication, estoppel, or otherwise, any rights under any patents, patent applications or other proprietary interests, whether dominant or subordinate, or any other invention, discovery or improvement of either party, other than the specific rights covering Subject Inventions under this Agreement.”

These contract terms establish that, in order for Medivation to prove that the SRA required The Regents to give Medivation an opportunity to license the A-series molecules, Medivation would have to prove that the A-series molecules were Subject Inventions. To constitute Subject Inventions, the molecules had to have been “first conceived” and also reduced to practice by The Regents during the performance period fixed by the SRA, i.e., between November 1, 2005, and December 31, 2007.

b. Summary Adjudication was Proper

Medivation alleged that The Regents breached the SRA by failing to disclose the existence of A51 and A52 to Medivation, and thereby deprived Medivation of the “opportunity to exercise its first right to negotiate an option or license with respect to said compounds.” Despite this pleaded theory, Medivation never disputed that A51 is not a Subject Invention under the SRA. Indeed, in the SAC itself, Medivation alleged that Jung and Sawyers invented A51 before The Regents began negotiations with Medivation.

Thus, The Regents’ and Aragon’s motions for summary adjudication focused on A52. Under federal patent law, an invention is first conceived “when the idea is so clearly defined in the inventor’s mind that only ordinary skill would be necessary to reduce the invention to practice, without extensive research or experimentation. [Citations.]” (*Burroughs Wellcome Co. v. Barr Laboratories, Inc.* (Fed.Cir. 1994) 40 F.3d 1223, 1228.) Respondents argued that undisputed evidence established that A52 was not a Subject Invention because it was “first conceived” before November 1, 2005, the first day of the performance period for The Regents’ work under the SRA.

Respondents relied primarily on the deposition testimony of Dr. Samedy Ouk, a scientist who was employed by The Regents and who worked in Jung’s lab. Ouk testified that he conceived of the A51 molecule and reduced it to practice no later than February 2005. He then developed the idea for A52 in October 2005. He diagramed the chemical structure of A52 on or before October 27, and by that time he already knew what method to use to synthesize A52 because it was the same method he previously used to synthesize A51. Ouk testified that he began synthesizing A52 on October 28, 2005.

In addition to Ouk’s deposition testimony, respondents produced a draft letter dated October 27, 2005, in which Ouk discussed and diagramed the structure of A52. The summary judgment evidence also included Ouk’s lab notebook, which reflected that Ouk had begun synthesizing A52 at least by October 28, 2005.

This evidence demonstrated that A52 was not a Subject Invention because it was first conceived in late October 2005, before the beginning of the performance period for the SRA work. Thus, respondents carried their burden, as the parties moving for

summary adjudication, of making “a prima facie showing of the nonexistence of any triable issue of material fact” on the issue whether the A-series molecules constituted a Subject Invention under the SRA. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*)). At that point, the burden shifted to Medivation to produce evidence “to make a prima facie showing of the existence of a triable issue of material fact.” (*Ibid.*) Medivation did not carry that burden or, indeed, produce any evidence of an alternative date of conception for A52.

c. Medivation’s Patent Law Theory

Medivation argues that the burden of producing evidence did not shift to Medivation during the summary adjudication proceeding because respondents’ evidence was insufficient as a matter of law to establish that A52 was first conceived before November 1, 2005. According to Medivation, Ouk’s testimony was inadequate because an inventor’s testimony regarding the date of conception must be corroborated by evidence that he or she actually disclosed the invention to someone else on the claimed date of conception. We disagree with this argument for two reasons.

First, Medivation’s theory that there is only one acceptable method of corroborating an inventor’s claimed date of conception is inconsistent with federal patent law. In some contexts courts have held that “an inventor’s testimony, standing alone, is insufficient to prove conception—some form of corroboration must be shown. [Citation.]” (*Price v. Symsek* (Fed.Cir. 1993) 988 F.2d 1187, 1194 (*Price*)).⁸ However, “there is no final single formula that must be followed in proving corroboration. [Citation.]” (*Berry v. Webb* (1969) 412 F.2d 261, 266.) Rather, “[a] ‘rule of reason’ analysis is applied to determine whether the inventor’s prior conception testimony has been corroborated. [Citations.] An evaluation of all pertinent evidence must be made so

⁸ Respondents reasonably question whether federal patent law would impose a corroboration requirement in the context of this case, which does not involve “a competing claim of prior inventor-ship or prior art, as reflected in an issued patent or prior art document.” (Compare, e.g., *Price, supra*, 988 F.2d at p. 1194.)

that a sound determination of the credibility of the inventor's story may be reached. [Citation.]" (*Price, supra*, 988 F.2d at p. 1195, fn. omitted.)

Medivation's authority does not hold otherwise. In *Coleman v. Dines* (1985) 754 F.2d 353 (*Coleman*), the appellant testified that he conceived the invention at issue in that case prior to the date of the respondent's patent, and he relied on a letter he sent to a colleague about his work as corroboration for his testimony. The *Coleman* court found that the letter did not actually describe the invention that appellant subsequently claimed as his own. But, the *Coleman* court did not hold (as Medivation contends) that disclosure of one's invention to a third party is the only acceptable form of corroboration. (*Id.* at pp. 359-360.) Furthermore, the *Coleman* court separately considered and applied the rule-of-reason test outlined above, and found the appellant's evidence did not constitute corroboration under that test. (*Id.* at p. 360.)

Second, Medivation ignores that, while Section 9 of the SRA dictates federal patent law applies to the date of conception inquiry, California law establishes the rules governing summary judgment. Defendants' evidence showed that A52 was not a Subject Invention under the SRA because it was conceived by Ouk before November 1, 2005. Under settled principles of California law, if a defendant moving for summary judgment meets his burden of showing that an element of plaintiff's claim cannot be established, the burden shifts to the plaintiff to present evidence creating a triable issue of material fact. (*Aguilar, supra*, 25 Cal.4th at p. 850; Code Civ. Proc., § 437c, subd. (p)(2).) Medivation did not carry that burden because it failed to produce any admissible evidence supporting a different date of conception for A52.

d. Medivation's New Theories on Appeal

Medivation contends that, putting aside the corroboration requirement, respondents' evidence was insufficient to satisfy even the threshold requirement of establishing that A52 was conceived prior to November 1, 2005. Medivation advances two theories. First, during his deposition, Ouk allegedly admitted that he did not conceive A52 prior to November 1 by testifying that when he began synthesizing that molecule on October 28, he did not actually know his method would work. According to

Medivation, this testimony raised a triable issue as to whether Ouk had an “operative method” for making his invention, which is a prerequisite for establishing a date of conception. (Citing *Creative Compounds, LLC v. Starmark Laboratories* (Fed.Cir. 2011) 651 F.3d 1303, 1312.) Second, Medivation contends Ouk’s October 27 letter describing A52 evinced only a general goal or research plan that he hoped to pursue, rather than a “definite and permanent idea” indicative of conception. (Citing *Burroughs, supra*, 40 F.3d at p. 1228.)

Medivation waived these two arguments by failing to make them during the summary judgment proceeding. (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 30-32 [adhering to the “familiar rule that ‘possible theories not fully developed or factually presented to the trial court cannot create a “triable issue” on appeal’ ” (italics omitted)]; see also *Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1488, fn. 3.)

Even if these arguments were properly before us, they lack merit. Medivation takes snippets from Ouk’s deposition testimony and draft letter out of context to create an impression that he lacked confidence in the viability of A52. At most, Ouk acknowledged he was not certain his invention would actually work until it was completed. That acknowledgement did not diminish the weight of undisputed evidence showing that Ouk actually diagrammed the A52 molecule, knew how to synthesize it, and began the synthesis process prior to November 1, 2005.

e. Medivation’s Extrinsic Evidence

Finally, Medivation contends that summary adjudication of its SRA claims was improper because the lower court failed to consider Medivation’s extrinsic evidence which created a triable issue of fact as to whether The Regents was contractually obligated to disclose to Medivation all of Jung’s research dating back to August 12, 2005, the date the SRA was signed. Medivation contends that this evidence was relevant and admissible to show that A52 is a Subject Invention under the SRA.

Like the ELA, the SRA contains an integration clause. Paragraph 20 of the SRA states: “This document constitutes the entire agreement between the parties, and may be

modified or amended only by written agreement signed by both parties.” Thus, parol evidence was inadmissible to vary the express terms of this contract. (*Casa Herrera, supra*, 32 Cal.4th at pp. 343-345.) One such term unambiguously stated that the performance period for work performed under the SRA began on November 1, 2005. Medivation’s extrinsic evidence regarding some other alleged disclosure obligation was legally irrelevant as it would not be proper to use that evidence to vary an express unambiguous provision in the SRA.⁹

C. The January 2013 Order

Medivation challenges the January 2013 order on the ground that the summary judgment evidence raised a triable issue of fact with respect to the damages elements of its claims against The Regents and Aragon.

1. Background

In October 2012, before the trial court ruled on the first set of defense motions for summary judgment, respondents filed a second set of motions that were limited to the issue of damages. In support of their motions, respondents argued that (1) Medivation has earned millions of dollars commercializing the RD-series molecules; (2) there was no evidence the A-series molecules would result in a marketable product that would compete with RD162-prime; and (3) the opinions of Medivation’s damages expert about possible royalties Aragon could earn by commercializing the A-series molecules in the future were speculation.

By the time the trial court ruled on these motions, it had already filed its December 2012 order, which held that Medivation did not have any contractual rights to the A-series molecules. Therefore, Medivation’s remaining causes of action against The Regents were limited to: (1) breach of the ELA by disclosing confidential information about the RD-series molecules to Aragon; and (2) breach of the SRA by failing to

⁹ In light of our affirmance that the SRA did not confer a contractual right to license the A-series molecules, we need not address Medivation’s challenge to the superior court’s alternative finding that, even if a breach of the SRA could be established, the only remedy for breach of an agreement to negotiate a license is reliance damages.

disclose all research data generated by The Regents' work. Medivation's remaining claims against Aragon were for inducing breach of contract and interference with contract by obtaining confidential information about the RD-series molecules from The Regents.

During the second summary adjudication proceeding, the defense produced evidence which established the following facts: Medivation had committed itself to the position that it would prove damages solely through expert testimony. Dr. Karen Becker, Medivation's expert on the Federal Drug Administration (FDA) approval process, did not offer any opinion about damages resulting from respondents' conduct. Dr. Gregory Leonard was Medivation's expert on "monetary remedies." Excerpts from Leonard's deposition established that his damages theories were predicated on Medivation's assumption that it owned rights to the A-series molecules. Leonard opined that damages caused by depriving Medivation of its right to license the A-series molecules could be measured by forecasting Aragon's anticipated profits from commercializing the A-series molecules. However, Leonard did not offer any independent opinion about damages caused by The Regents' alleged disclosures or nondisclosures of information about the RD-series molecules, which were the only theories of liability alleged in the remaining causes of action against The Regents and Aragon.

In its January 2013 order, the trial court concluded that The Regents and Aragon carried their burden as the parties moving for summary adjudication by demonstrating that Medivation did not have any evidence of damages resulting from The Regents' failure to disclose all of the data about the RD-series molecules to Medivation and/or its disclosure of some of that data to Aragon. Therefore, the burden shifted to Medivation "to set forth specific facts showing that a triable issue of material fact exists on the issue of damages," and Medivation failed to make that showing.

2. Medivation's Contentions

Medivation first contends that the January 2013 order must be reversed because it hinges on erroneous findings the trial court made in the December 2012 order. In light of our conclusions above, we reject this argument.

Alternatively, Medivation contends the trial court erred by finding that Medivation had to demonstrate specific monetary damages to avoid summary adjudication of the damages elements of its remaining claims. “[I]t is the uncertainty as to the fact of damage rather than its amount which negatives the existence of a cause of action[.]” (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 14, fn. 3.) Therefore, Medivation argues, regardless of the validity of the trial court’s conclusion that Medivation failed to demonstrate specific monetary damages, that finding did not support the summary adjudication ruling.

Medivation has misconstrued clear and detailed language in the January 2013 order. The trial court separately addressed each respondent’s motion for summary adjudication, and found that both motions were supported by excerpts from the depositions of Becker and Leonard, which established that neither of them offered any opinion as to what, if any, damages were *caused* by the alleged disclosures or nondisclosures of information by The Regents. The court also separately addressed additional excerpts from the depositions of Leonard and Becker as well as new declarations from them, which Medivation used to oppose respondents’ motions. The court found that none of that evidence created a triable issue of material fact “with respect to any damages *resulting* from the remaining claims against The Regents.” (Italics added.) In ruling on Aragon’s motion, the court reiterated that Leonard’s damages model “bears no relationship” to the alleged disclosures or nondisclosures of information by The Regents, and that Becker’s “abstract discussion” was “divorced from any specifics relating to the issues in this case.”

On appeal, Medivation does not attempt to demonstrate that its damages experts offered any opinion about whether The Regents’ alleged failure to disclose information to Medivation and/or its alleged disclosure of information to Aragon caused Medivation to suffer damage. Instead, Medivation argues that “[i]t is plain” and a matter of “common sense” that these alleged acts would cause harm. However, this generalization is not evidence. Medivation failed to meet its burden of “producing evidence showing the existence of a triable issue of fact as to causation of damages.” (See *Franklin v. Dynamic*

Details, Inc. (2004) 116 Cal.App.4th 375, 394.) Therefore, we affirm summary adjudication of the remaining causes of action against The Regents and Aragon. (*Ibid.*)

V.

THE JURY TRIAL

A. Background and Issues on Appeal

As noted in our summary of the procedural history of this litigation, Medivation's claims against Jung for breach of the 2006 Stock Option Agreement and fraud were tried to a jury. Medivation's trial theory was that Jung created the A-series molecules by making insignificant changes to the two most promising RD-series molecules that were licensed to Medivation, and then Jung made multiple false representations to Medivation and The Regents in order to secure rights to the A-series molecules for himself and Sawyers. Medivation argued these alleged actions by Jung constituted fraud and a breach of the 2006 Stock Option Agreement that Jung executed with Medivation. Ultimately, the jury found that Jung's activities in connection with the A-series compounds constituted a breach the 2006 Stock Option Agreement, but that he did not commit fraud.

On appeal, Medivation contends it is entitled to a new trial on its fraud claim for two independent reasons. Medivation's first argument is that it is entitled to a retrial of its fraud claim if this court reverses any part of the December 2012 summary judgment order, which prevented Medivation from presenting evidence that Jung deprived Medivation of contractual right to license the A-series molecules. Jung disputes this contention, but we need not resolve the disagreement since we are not reversing the December 2012 summary judgment order for the reasons discussed above.

Alternatively, Medivation contends that, regardless of whether Medivation had any contractual rights to the A-series molecules, the trial court committed reversible trial error by precluding Medivation from establishing its primary theory of fraud liability which was that Jung's alleged fraud deprived Medivation of profits it would have earned if RD162-prime did not have to compete with A52 in the commercial market for cancer drug treatments. Resolving issues associated with this argument requires a more detailed consideration of the trial evidence.

B. Trial Evidence and Jury Verdicts

1. *The Molecules*

In early 2003, Jung and Sawyers began working together on a research project to develop a treatment for prostate cancer. By that time, Sawyers had already completed tests which showed that a treatment-resistant strain of prostate cancer would be susceptible to treatment with a drug that could bind with the cancer cells and inhibit their growth. The purpose of Sawyers's collaboration with Jung was to create and test a variety of different molecules in search of viable treatments.

As a starting point, the team began with a molecule that had already been invented by a French company, which is called RU59063. RU59063 has a known binding quality but does not inhibit cancer growth. Using a process of trial and error, changes were made to the atoms comprising RU59063, and, over time, Jung and Sawyers invented the RD-series molecules. The first promising molecule in that series was RD37, which was discovered in early 2004. By March 2005, the focus had shifted to RD131, and, in June 2005, the team invented RD162. In early 2006, Jung made very slight changes to RD162 and named the new invention RD162-prime.

Meanwhile, in the summer of 2004, Jung, Sawyers, and their teams had a meeting where they conceived ideas for two other series of molecules, which they named the JY-series and the A-series, each of which had a structural base that was distinct from the RD-series. The JY-series, which changed the structure of RU59063 to form a "pyrazolone" in the molecule's center ring, was never developed beyond the conception stage. The idea behind the A-series was to substitute new atoms in the left ring of the RU59063 molecule to see if any changes would encourage binding. This idea was not grounded in scientific literature; it was an untested hypothesis that might or might not prove effective. In August 2004, Jung's assistant, Samedy Ouk, designed A51. He began synthesizing A51 in October 2004, and completed the invention in January of 2005. Ouk conceived A52 no later than October 28, 2005, and he completed synthesizing that invention in November 2005.

The Regents own and manage all of the intellectual property rights in the RD-series, JY-series, and A-series molecules. These rights are managed and protected by The Regents' Office of Intellectual Property. Emily Loughran is the director of licensing for that office. Dr. Claire Wake is the licensing officer who negotiated licensing agreements for the RD-series molecules and the A-series molecules. Wake's duties as a licensing officer include meeting with inventors employed by The Regents, assessing the inventions for patentability and commercial potential, and, when appropriate, arranging for the filing of patent applications and seeking licensees to commercialize the patent rights. When negotiating the license agreements in this case, Wake followed The Regents' policies, which required that a license to commercialize a patented invention include, among other things: (1) a research reservation which preserves the right for all academic researchers to continue their work on licensed products so that the license cannot be used to shut off an area of inquiry; (2) a commitment from the licensee to diligently develop and commercialize the licensed technology; and (3) terms that ensure The Regents a fair return for the technology covered by the license.

2. Medivation's Agreements with The Regents

In early 2005, Medivation's president and chief executive officer, Dr. David Hung, read an article about Sawyers's research and became interested in his project. Hung contacted Sawyers, a former colleague, to request more information. When Hung expressed an interest in licensing rights to RD37, he was referred to Wake. In around April 2005, Wake began negotiating a licensing agreement with Medivation's CBO and CFO, Patrick Machado. Wake never had a discussion with anyone at Medivation about including the A-series molecules in Medivation's license.

On August 12, 2005, Medivation and The Regents executed the ELA and SRA.¹⁰ In September, before the performance period for work under the SRA began, Jung sent a letter to Machado acknowledging receipt of a check from Medivation for \$10,000 to “help support the expense of our prostate cancer research project.” In his letter, Jung said that his team had “several candidates moving forward and perhaps an entirely new series on the horizon.”

In October 2005, Samedy Ouk discussed the structure of RD162 at an academic conference. The incident led Medivation to become concerned about potential patent problems if structures of molecules were publicly disclosed before they were specifically claimed in The Regents’ patent applications. Around the same time, Machado also told Wake that he wanted to “amend the definition of ‘Regents’ Patent Rights’ to make sure it reflects our mutual intent that our transaction covers the entire RD family, not just a subset.” Wake responded to these concerns in an email which stated: “I cannot agree to all RD compounds that may be created by the Jung lab in the future. We can, however, add in the current RD members that exist at the time of the Amendment but which were not specifically included in the 2005-438 filing. For example, we can amend the Appendix of Regents’ Patent Rights to include [a new application] which specifically claims RD 134 through RD 167 (or whatever the correct numbers are).”

In early November 2005, Wake sent Jung and Sawyers an email about Medivation’s request that The Regents “specifically claim the RD series compounds that were not specifically claimed” in any of the patent applications listed in the ELA. Explaining her intention not to charge Medivation an additional licensing fee, Wake stated that “Medivation had assumed those compounds were already specifically covered in the patent rights we already licensed to them. From their perspective, they believed

¹⁰ Medivation contends it executed these agreements with The Regents only after Jung confirmed that all of thiohydantoin molecules created in Jung’s lab would be covered by the license. The evidence that Medivation cites (1) does not support this contention; (2) was stricken from the summary judgment record; and (3) was not admitted at the jury trial.

they were licensing a family of molecules from which they would choose the best for commercial development.”

On November 4, 2005, four days into the performance period for the SRA work, Medivation and The Regents executed the First Amendment to the ELA, which amended Appendix A by adding a new patent case specifically covering the structure of RD162, and which incorporated an Exhibit A that set forth the visual depictions of the structures of the molecule in the RD-series that had been licensed to Medivation.

In late November 2005, Machado sent an email to Wake with copies to Sawyers, Jung, and Ouk. Machado wanted “to make absolutely sure that each of the specific RD structures covered by our license agreement gets claimed appropriately in the patent applications.” In an email reply, Ouk attempted to explain why all of the RD-series molecules had not been included in prior applications. Ouk also stated that he believed that the most recent application claimed an interest in all of the “Biaryl+something compounds,” in addition to specifically claiming the structure of RD162. Jung did not respond to Machado’s original email or to Ouk’s reply.

In December 2005, David Hung asked Jung to make Medivation a replacement molecule for RD162, the molecule that Ouk had disclosed at the November conference. Jung created RD162-prime and another similar molecule, and sent drawings of both to Hung and Machado on January 4, 2006.

In February 2006, David Hung sent a memo to Patrick Machado about Jung. Hung described Jung as a “really good guy” who was working on several very interesting research projects. He told Machado that Jung was offended that Medivation had acknowledged Sawyers on its website, but did not mention Jung’s contribution. Jung had made a “subtle hint” to Hung about wanting a direct tie to Medivation. Hung suggested to Machado that Medivation put Jung on its SAB. A few weeks later, Hung sent Jung an email expressing Medivation’s appreciation for all the work Jung had done for it and “formally asking” Jung to join Medivation’s SAB. Hung said that the “standard compensation for all of our SAB members is 25,000 options in Medivation stock.” Jung

accepted Hung's offer, and signed the 2006 Stock Option Agreement, which required that he provide "faithful and efficient services."

In March 2006, Machado sent an email to Jung and others requesting a meeting to discuss an upcoming patent filing on the RD patent applications that would specifically cover the structure of RD162-prime. One topic Machado wanted to address was whether "all of the existing thiohydantoins are appropriately disclosed and claimed in the patent applications (most importantly, [RD162-prime]? Others?)." Machado also told Jung: "[I]f there are any newly synthesized members of the thiohydantoin class since our last filing, we should identify those and reach consensus on how to deal with them." Jung attended the meeting proposed in Machado's email, and testified at trial that his recollection was that the group had a very specific discussion solely about the RD-series molecules.

In May 2006, Medivation and The Regents executed a "Second Amendment" to the ELA which added patent applications to Appendix A that claimed rights in the structure of RD162-prime. Machado testified that Medivation executed this amendment in reliance on assurances from Jung and The Regents that all of the thiohydantoins that had been discovered using Sawyers's methods had been disclosed to Medivation and were covered by the ELA.

In October 2006, as the original performance period for work under the SRA was coming to an end, Jung's team wanted to continue their research to see if they could find additional molecules that would have "good activity" without degrading. However, Medivation had decided to commercialize RD162-prime, and it did not want Jung to "do any more work whatsoever on the RD series." Ultimately, the parties reached a "compromise" that Jung's team would make only three more molecules in the RD-series. Then, they would "shift" all SRA work from the RD-series project to a different project that was already underway in Jung's lab which involved researching molecules with "osteogenic properties." In January 2007, Medivation and The Regents executed an

amendment to the SRA which implemented this compromise and extended the performance period for Jung's work to December 31, 2007.¹¹

Claire Wake negotiated all the ELA amendments which added patent applications covering new molecules in the RD-series that had been discovered by Jung's team. Wake did not intend for any amendment to include The Regents' rights to the A-series molecules, nor did she ever disclose those molecules to Medivation. It was also undisputed at trial that Jung never disclosed the A-series molecules.

3. The A-Series Molecules

In September 2006, Sawyers accepted a position at Memorial Sloan-Kettering Cancer Center (Sloan Kettering), a hospital in New York with a large infrastructure for conducting chemistry and pharmacokinetics research, which afforded him the opportunity to research whether A52 was going to be an interesting new medicine. In March 2007, The Regents and Sloan-Kettering executed a collaboration agreement so that Sawyers and Jung could continue their work on the A-series molecules. The Regents did not disclose the A-series research program to Medivation. As Wake testified, "there was no obligation to disclose to Medivation the research program" and just "because Pat Machado wanted things didn't mean I needed to show him."

On December 28, 2007, Sawyers sent an email to Wake, with copies to Jung and others, which stated: "I am writing this email to introduce you to Richard Klausner from The Column Group. Rick and I have had a series of discussions about starting a company to move A52 forward clinically as a prostate cancer drug. Rick would like to speak to each of you in early January to discuss the IP around A52 and various other

¹¹ During the extended performance period, Jung's team developed three additional RD molecules and provided Medivation with the pertinent data, although Medivation never requested delivery of the molecules themselves. Jung's lab also began making new analogues of the osteogenic molecules and delivered them to Medivation. However, in April 2007, Medivation decided it was no longer interested in that project. So, Jung obtained alternate funding for his osteogenic research from the National Institutes of Health.

licensing issues.” In 2009, The Column Group founded Farallon, which was later renamed Aragon. Sawyers and Jung were scientific founders of that company.

In a May 19, 2009 letter, Jung resigned from Medivation’s SAB, and also terminated a consulting agreement he had executed with Medivation “for the synthesis of Dimebon and its analogues.” Jung stated that he was becoming “a founder of a new start-up company that will work on various hormone-receptor related diseases,” and that he was severing professional ties to Medivation to avoid any possible conflict of interest. Jung also liquidated his Medivation stock, for which he was paid approximately \$400,000.

On May 20, 2009, Machado sent an email to Jung and to Sawyers, who had also terminated his relationship with Medivation. Machado expressed disappointment they would no longer be working together, but acknowledged that “as someone who has been bitten by the ‘start-up bug’ myself, I can absolutely understand the excitement you must both feel as you embark on a new venture.” Machado also wished the pair “the best of luck” with their new company, “as long as you’re not competing with [RD162-prime], of course!”

That same day, Machado sent an email to Medivation’s board of directors regarding the status of “various ongoing partnering discussions.” As a “PS” to his report, Machado added: “[O]n a related note, Charles Sawyers and Mike Jung have started a new company to develop nuclear receptor antagonists in various hormone-refractor cancers—i.e., a direct competitor of us. So both have resigned from our SAB and as consultants to MDVN. We are aware that they have a compound for HRPC that is ready to enter the clinic shortly.”¹²

On May 18, 2009, The Regents executed the Aragon Agreement, which granted Aragon an exclusive license to The Regents’ patent rights to the A-series molecules.

¹² At trial, Machado testified that Medivation did not learn that Aragon was a direct competitor until January 2011 when The Regents advised Medivation it was going to employ new outside patent counsel to work on Aragon’s portfolio in order to avoid a conflict of interest with Medivation’s portfolio.

When Wake negotiated the Aragon Agreement, she was aware that Jung and Sawyers were “in discussions with The Column Group about being founding scientists in the company that would license the A51/A52 patent rights,” but she did not negotiate directly with Jung or Sawyers, and their involvement in the project did not impact her negotiations.

4. Efforts to Commercialize RD162-Prime and A52

In October 2009, Medivation partnered with Astellas in order to obtain FDA approval of RD162-prime and commercialize it under the name Xtandi. Astellas paid Medivation an upfront fee of more than \$100 million, and agreed to pay substantial additional sums tied to the product’s success. In August 2012, the FDA approved Xtandi as a treatment for late stage prostate cancer. By the end of 2012, Xtandi was on the market, available for doctors to prescribe to patients suffering from prostate cancer, and was covered by insurance.

In the fall of 2012, Aragon released a report that A52 had completed a Phase II clinical trial. In planning a Phase III trial for A52, Aragon elected to seek FDA approval of A52 as a treatment for early stage “non-metastatic prostate cancer.” By contrast, Xtandi had secured FDA approval as a late stage prostate cancer treatment. In 2013, Johnson & Johnson purchased Aragon.

5. Jury Verdicts

Medivation sought damages from Jung on three claims: (1) intentional misrepresentation; (2) false promise; and (3) breach of the 2006 Stock Option Agreement. Before the jury was instructed regarding the elements of these claims, the court gave the following instruction regarding ownership of the A-series molecules:

“You have heard about specific chemical compounds called ‘A51’ and ‘A52.’ As a matter of law, neither the [ELA] nor the [SRA] gave Medivation any rights to the A51 or A52 compounds. By this I mean that Medivation never had any rights to the A51 or A52 compounds, and those compounds were the exclusive property of [The Regents]. The Regents was free to license those compounds to anyone of The Regents[’] choice. This also means that Dr. Jung was not required by the [ELA] or the [SRA] to disclose the

existence of A51 or A52 to Medivation. It is for you to decide whether Dr. Jung made any intentional misrepresentation or false promise regarding A51 and A52 to Medivation”

The jury was also instructed that it could not award Medivation damages “for future loss or harm, that is, for any loss or harm not yet suffered. This means, for example, that Medivation is not entitled to damages related to any competitive harm or lost profits that it would suffer as a result of some other company such as Aragon or Johnson & Johnson having rights to A51 or A52. [¶] Further, Medivation is not entitled on any of its claims to damages resulting from Medivation not having rights to A51 or A52. . . .”

The jury returned its verdicts on a form that was drafted by the trial court after the parties failed to agree on the language of either a general or special verdict form. Although resembling a general verdict, the jury verdict form that was used in this case asked for separate rulings on Medivation’s two theories of fraud, intentional misrepresentation and false promise, as a well as a third ruling on the breach of contract claim. A second page of the verdict form instructed the jury to make additional findings only in the event that it had returned one or more verdicts in favor Medivation. If the jury were to find in favor of Medivation on either fraud claim, it was instructed to determine the amount of damages to award for fraud. If it found that Jung breached the 2006 Stock Option Agreement, then the jury was to award damages on that claim. The jury found in favor of Jung on the two fraud claims and in favor of Medivation on the breach of contract claim. Under the second part of the verdict form, the jury awarded Medivation \$406,917.50 for breach of the 2006 Stock Option Agreement.

C. Medivation’s Claims Are Not Barred by the General Verdict Rule

Medivation contends that the trial court committed reversible trial error because it precluded the jury from properly considering Medivation’s primary theory of damages liability by (1) excluding admissible evidence regarding the profits that Medivation would have earned in the future if RD162-prime did not have to compete with A52 in the

commercial drug market; and (2) failing to properly instruct the jury regarding the damages element of fraud.

Jung contends that this court should not consider the merits of Medivation's claims because the jury's finding that he did not commit fraud must be affirmed under the "general verdict rule."

"The 'general verdict rule' . . . provides that where several counts are tried, a general verdict will be sustained if any one count is supported by substantial evidence and is unaffected by error, despite possible insufficiency of evidence as to the remaining counts. [Citation.] The rule is based on the assumption 'that the jury found on the cause of action or theory which was supported by substantial evidence and as to which there was no error,' an assumption that may be proven incorrect by the special verdict or response to special interrogatories. [Citation.]" (*Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1157; see also *Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 673.)

Under the general verdict rule, when one or more of the possible theories upon which the jury might have based its verdict is not supported by substantial evidence, but other theories that were also presented are supported by such evidence, it is presumed "that the jury reached its verdict on a theory that is supported by the evidence." (*Clement v. State Reclamation Board* (1950) 35 Cal.2d 628, 643 (*Clement*)). This general verdict rule "also applies to cases in which no other verdict is possible as a matter of law." (*Ibid.*) However, the rule does not apply to "a case . . . in which the jury has been precluded by erroneous instructions from considering a valid theory upon which a result different from that actually reached might have been supported" because in that situation, the alleged error is not "cancelled" out by the fact that the jury could have found for the prevailing party on another ground. (*Ibid.*)

In the present case, Jung correctly contends that the fraud verdict could have been based on the jury's acceptance of any number of defense theories, including that (1) Jung did not commit fraud; (2) Jung was immune from fraud liability; or (3) Medivation's fraud claim was barred by the statute of limitations. Thus, if Medivation were challenging the sufficiency of the evidence to support the fraud verdict, the general

verdict rule would likely apply. However, Medivation does not make a sufficiency of the evidence challenge, but argues instead that erroneous trial court rulings precluded the jury from properly considering an allegedly valid fraud theory. If these claimed errors have merit, they would not be cancelled by the fact that the jury could have found in favor of Jung on some other ground. Thus, the general verdict rule does not apply here. (*Clement, supra*, 35 Cal.2d at p. 643; see also *Lundy v. Ford Motor Co.* (2001) 87 Cal.App.4th 472, 480 [general verdict rule does not apply when “there is no way to eliminate the likelihood that the jury chose the theory affected by the instructional error”].) Therefore, contrary to Jung’s argument on appeal, Medivation’s claims of error must be addressed on their merits.

D. The Exclusion of “Lost Profit” Evidence Was Not Error

As noted above, Medivation first contends the trial court erroneously excluded evidence that Medivation offered to establish that Jung caused it to suffer compensable “lost profit” damages.

1. Background

Prior to trial, Jung filed a motion to exclude expert testimony from two of Medivation’s experts on damages, Karen Becker and Gregory Leonard. Before ruling on the motion, the court waited to hear all of Medivation’s other trial evidence, and then conducted an Evidence Code section 402 hearing to evaluate the propriety of the expert testimony.

a. Becker’s Opinion

Becker is a managing director of a company that provides regulatory and technology support services to healthcare companies developing new products. Medivation hired Becker to provide expert testimony regarding “FDA regulations.” Becker testified that there is a high likelihood that A52 will be approved by the FDA; she opined that the FDA will apply its priority review criteria to this drug, and that it is at least 80 percent likely that A52 will be approved for the commercial market.

Becker’s opinion was premised on her assumption that Medivation’s development and commercialization of RD162-prime significantly contributed to the “state of

development” of A52. As support for this assumption, Becker reasoned that: A52 is an analogue of RD162-prime; RD162-prime has already been approved; and significant events during the FDA approval process for RD162-prime will have a “de-risking” effect with respect to the FDA’s evaluation of A52.

b. Leonard’s Opinion

Leonard is an economist retained by Medivation to “look at potential measures of harm to Medivation that resulted from the alleged conduct in th[is] case.” Leonard testified that in formulating his opinions, he did not assume that Medivation either has or had license rights to A52. He also testified that he had no opinion about liability, but only about how to quantify Medivation’s harm. By offering an opinion about Medivation’s “harm,” Leonard was “not offering any opinions on causation.” He defined harm as competitive harm in the sense that no company with a product on the market wants a competitor.

Leonard testified about two ways to measure Medivation’s harm: (1) the value of A52; and (2) the “lost profits that Medivation would sustain if [A52] makes it to market and ends up taking sales away.” Based on his analysis, Leonard proposed to testify that A52 has a present value of \$650 million, and that Medivation’s projected lost profits resulting from having to compete with A52 beginning in the year 2018 and ending in the year 2029 will be \$244.3 million. Leonard described these two conclusions as interrelated, the first “inform[ing]” the second.

The model Leonard employed to support his conclusions was multifaceted. First, he calculated a preliminary value for A52 of \$61.7 million, which represented the initial infusion of investor funding for Aragon’s project. Then he developed a formula for reverse-engineering a number that would represent how much profit A52 would have to generate to justify that initial investment. Leonard described his model as a “discounted cash flow model” which was predictive of A52’s future earnings. To make this prediction, Leonard assumed, among other things, that A52’s developmental path will essentially track the path forged by RD162-prime. Leonard also assumed that A52 will enter the commercial marketplace in mid-2018. Leonard then took Medivation’s own

forecast of its anticipated future profits of RD162-prime during the relevant time period, and made adjustments to that number to account for costs and risks A52 is likely to face.

Applying his formula, Leonard first concluded that the lost profits that Medivation will lose to Aragon from 2018-2029 will total \$95.4 million. Then Leonard repeated his analysis, but adjusted his risk reduction figures based on Becker's conclusion that there is an 80 percent likelihood that A52 will secure FDA approval. This reduced risk of failure led to a "probability adjusted lost profits number of \$266.8 million." Then, Leonard repeated his analysis a third time, taking into account the fact that Aragon sold its interest in A52 to Johnson & Johnson. Incorporating this new fact led Leonard to conclude that the present value of A52 is actually \$650 million, and that Medivation's projected lost profits to A52 from 2018 through 2029 will be \$244.3 million.

c. The Trial Court's Ruling

The trial court sustained Jung's objections to the expert opinions of these witnesses on two independent grounds: (1) anticipated lost profits from potentially having to compete with A52 in the future are essentially "benefit of the bargain" damages, which are not the type of fraud damages authorized by Civil Code section 3333 (section 3333) under the circumstances of this case;¹³ and (2) the opinions of both experts are impermissibly speculative under the criteria set forth in *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 (*Sargon*). We will separately consider these two rulings.

2. Anticipated Lost Profits

"There are two measures of damages for fraud: out of pocket and benefit of the bargain. [Citation.] The 'out-of-pocket' measure of damages 'is directed to restoring the plaintiff to the financial position enjoyed by him prior to the fraudulent transaction, and

¹³ At the hearing on Jung's motion to exclude expert testimony, the parties and trial court all agreed that section 3333 governs the scope of damages potentially available for Medivation's fraud claim. Section 3333 states: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

thus awards the difference in actual value at the time of the transaction between what the plaintiff gave and what he received. The “benefit-of-the-bargain” measure, on the other hand, is concerned with satisfying the expectancy interest of the defrauded plaintiff by putting him in the position he would have enjoyed if the false representation relied upon had been true; it awards the difference in value between what the plaintiff actually received and what he was fraudulently led to believe he would receive.’ [Citations.]” (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240 (*Alliance*).

“ ‘In California, a defrauded party is ordinarily limited to recovering his “out-of-pocket” loss’ [Citation.]” (*Alliance, supra*, 10 Cal.4th at p. 1240; see also *Gagne v. Bertran* (1954) 43 Cal.2d 481, 490-491; *Christiansen v. Roddy* (1986) 186 Cal.App.3d 780, 790.) When the out-of-pocket measure applies, a plaintiff is not “entitled to recover damages measured by the profit he could have reaped” had the alleged misrepresentation been true, but instead is limited to recover what he actually lost by relying on the false statement. (*Kenly v. Ukegawa* (1993) 16 Cal.App.4th 49, 53.)

Here, Medivation’s trial theory was that it executed the ELA, SRA and ELA amendments in reliance on Jung’s misrepresentations that Medivation was securing a license of all of The Regents’ thiohydantoin, which included the A-series molecules. However, Leonard did not offer any opinion about the difference in value between the license that Medivation paid for and the license that it actually received. Instead, he proposed to offer an opinion about losses Medivation might sustain in the future if RD162-prime has to compete with A52. That potential future harm is not an out-of-pocket loss, but a consequence of the fact that The Regents did not give Medivation a contractual right to commercialize A52. Awarding damages for this perceived harm would be improper because it would give Medivation the benefit of a bargain that it never made. Medivation was not entitled to recover the benefits of a hypothetical bargain as damages for false promise fraud. (See, e.g., *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1176 (*Simon*).

In presenting his damages theory, Leonard characterized the estimated future value of A52 as an anticipated lost profit of RD162-prime, but that presentation does not

alter the substantive character of the underlying formula which calculates an expectation damage that is inextricably tied to a contract right Medivation simply never had. Thus, we conclude that Leonard's testimony was properly excluded as irrelevant because he did not offer an opinion about any harm or damages that were recoverable under the circumstances of this case. Furthermore, because the only purpose of Becker's opinion was to provide a foundation for Leonard's assumption that A52 will obtain FDA approval, it too was properly excluded as irrelevant.

Medivation contends that section 3333 authorizes recovery of damages for all detriment proximately caused by the alleged fraud, and that such harm can include future lost profits so "long as the fraud was 'a substantial factor in causing' the loss." (Quoting *Strebel v. Brenlar Investments, Inc.* (2006) 135 Cal.App.4th 740, 749 (*Strebel*)). However, Medivation mistakenly relies on *Strebel*. The *Strebel* plaintiff sought damages for intentional fraud *and* breach of fiduciary duty. There is authority for applying a broader benefit of the bargain measure of damages in intentional fraud cases against a fiduciary. (See, e.g., *Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 565-567 [and cases discussed therein].) Furthermore, as the *Strebel* court found, neither the out-of-pocket measure nor the benefit-of-the-bargain rule fit the unique circumstances of the fraud that was proven in that case. The *Strebel* plaintiff was awarded damages which compensated him for the appreciation value of a home that a fiduciary fraudulently induced him to sell. In other words, the *Strebel* plaintiff recovered damages to compensate him for what he gave up by selling his home. Here, by contrast, Medivation seeks damages not for what it gave up by executing the ELA, but rather for what it hoped to gain if its bargain with The Regents had been a different one.

Medivation also mistakenly relies on *Asahi Kasei Pharma Corp. v. Actelion Ltd.* (2013) 222 Cal.App.4th 945 (*Asahi*). In that case, the plaintiff entered into a license agreement with the defendant-licensee to commercialize plaintiff's drug for treating pulmonary arterial hypertension (PAH). But when defendant-licensee was acquired by the defendant-parent, which held a dominant share of the relevant market for PAH drug treatments, they jointly decided to discontinue development of plaintiff's product for

“ ‘business and commercial reasons.’ ” (*Id.* at p. 950.) In plaintiff’s subsequent suit for intentional interference with the license agreement, a jury awarded plaintiff substantial compensatory damages, which included the lost profits plaintiff claimed it would have received under the license agreement. (*Id.* at pp. 950, 968.) On appeal, the *Asahi* court affirmed the award of lost profit damages. (*Id.* at p. 968.)

Medivation contends that *Asahi* establishes that Medivation can also recover future lost profit damages from Jung. We disagree. First, the damages award in *Asahi* was for tortious interference with a contract, not for fraud. Second, the lost profit damages that the *Asahi* plaintiff recovered were what the plaintiff “claimed it would have received under the License Agreement” had that agreement not been breached. (*Id.* at p 968.) Here, by contrast, before trial commenced, the summary judgment rulings conclusively established that Medivation did not have a license to A52, which meant that it was not entitled to the benefits of a bargain that it never made.

3. Speculative Expert Testimony

Even if Medivation’s theory of damages liability were legally sound, we would affirm the trial court’s alternative finding that the expert opinions of Becker and Leonard were properly excluded under the criteria set forth by the California Supreme Court in *Sargon, supra*, 55 Cal.4th at pp. 769-770.

Sargon establishes or affirms the following principles: First, the trial court has a “substantial ‘gatekeeping’ responsibility” with respect to expert opinion testimony offered at a jury trial. (*Sargon, supra*, 55 Cal.4th at pp. 769, fn. omitted.) Specifically, “the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative. Other provisions of law, including decisional law, may also provide reasons for excluding expert opinion testimony.” (*Id.* at pp. 771-772, fn. omitted.) Second, when performing its gatekeeping function, the trial court must take care to focus on the expert’s methodology rather than his or her conclusions, and not evaluate the persuasiveness of

competing expert opinions. (*Id.* at p. 773.) Third, a ruling admitting or excluding expert evidence is reviewed for abuse of discretion, unless based on a conclusion of law. (*Ibid.*)

In this case, the trial court's ruling was supported by a thorough and well-reasoned 23-page analysis, which included 22 separate factual observations about what the trial evidence already demonstrated regarding the likelihood of A52 actually becoming a direct competitor of RD162-prime. On appeal, Medivation ignores whole parts of that analysis, making it virtually impossible to demonstrate an abuse of discretion.

Furthermore, Medivation's objections to specific aspects of the trial court's reasoning are either unsound or insufficient to establish error under the principles outlined in *Sargon*.

With respect to Becker's testimony, Medivation contends the trial court committed an error of law by excluding Becker's opinion that A52 will secure FDA approval solely because it was not supported by Phase III test data. (Citing *Asahi*, *supra*, 222 Cal.App.4th at p. 971.) However, the trial court did not find that Phase III data is always required to support an expert opinion predicting FDA approval. Rather, it made several factual findings about this expert's testimony, which culminated in its conclusion that positive data from Phase I and II testing of A52 was insufficient, by itself, to support Becker's opinion that there is an 80 percent likelihood that A52 will secure FDA approval. The trial court's finding was not inconsistent with the holding or reasoning of *Asahi*, *supra*, 222 Cal.App.4th 945.

As discussed above, *Asahi* was an appeal from a judgment awarding lost profit damages to a plaintiff that was prevented from commercializing its drug because of defendants' tortious interference with a license agreement. (*Asahi*, *supra*, 222 Cal.App.4th 945.) Appellants argued that plaintiff's damages were uncertain because its product had not completed a Phase III study and, therefore, FDA approval was unpredictable. (*Id.* at p. 971.) That fact was not dispositive on appeal, however, because other substantial evidence supported the jury award. (*Id.* at p. 970.) That evidence included several reports and scientific studies which assessed the strength and value of preclinical data, clinical study data, and data from two different patient populations who had used the plaintiff's drug in other countries where it was commercially available.

(*Ibid.*) In addition, several experts testified (apparently without objection) that these relevant studies and data established “to a reasonable certainty” that the product would have obtained FDA approval on a timeline that one of the defendants had created before it decided to discontinue development of that drug. (*Id.* at pp. 970-971.) Finally, there was substantial evidence that the reason defendants discontinued development of plaintiff’s drug was precisely because it would obtain FDA approval and become a competitive threat to one defendant’s existing product. (*Ibid.*)

In contrast to the present case, *Asahi* did not turn on a discretionary trial court ruling. Furthermore, the evidence establishing the existence of lost profit damages in *Asahi* was qualitatively and quantitatively stronger and more reliable than the reasoning Becker gave for her opinion in this case. Finally, even if *Asahi* casts doubt on the trial court’s reliance on the fact that A52 has not entered Phase III testing, the court identified several other aspects of Becker’s analysis that made her conclusions unreliable.

For example, Becker relied on the fact that the FDA had approved RD162-prime to support her opinion that A52 will obtain FDA approval. But, the court found that Becker’s reliance on RD162-prime’s track record was based on her erroneous assumption that A52 would be used to treat an advanced disease. The trial evidence showed the Phase III clinical trial plan for A52 was for use as an early stage prostate cancer treatment, which is a material distinction from RD162-prime, an FDA approved treatment for late-stage prostate cancer. The evidence also showed that Johnson & Johnson, which had acquired rights in A52, already had a different approved drug for treating late stage prostate cancer.

The trial court’s conclusion that Becker’s opinion regarding the likelihood of securing FDA approval was speculative was also supported by several admissions that Becker made during her testimony, including that: she did not consider what type of FDA approval was being sought for A52; she “ignored multiple known failures of prostate cancer drug candidates in clinical trials”; she failed to consider prostate cancer clinical trials that were ongoing at the time of trial; and she was not qualified to predict the

likelihood that A52 would be approved over other drugs currently seeking FDA approval as an early stage prostate cancer treatment.

The trial court's reasons for excluding Leonard's opinions were equally thorough and sound. To begin with, Leonard's opinions all depended on his assumption that A52 would obtain FDA approval by 2016 and be ready to enter the market by 2018. But the sole basis for that assumption was Becker's opinion. In addition to the fact that Becker's opinion was unreliable for the reasons outlined above, she did not offer a prediction about when A52 would obtain FDA approval, or an opinion that it would be approved as a late-stage cancer drug that would compete with RD162-prime.

Furthermore, Leonard relied heavily on Medivation's own predictions about anticipated profits from RD162-prime as indicative of profits A52 will make during that same time period. As the trial court found, these uncertain predictions about hypothetical future events added two additional layers of speculation to Leonard's opinion.

Medivation attempts to defend Leonard's opinions with the general proposition that California law permits experts to rely on internal business documents to determine lost profits. (Citing, e.g., *Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes* (2010) 191 Cal.App.4th 435, 474.) Here Leonard did not simply use internal business documents, he relied on Medivation's self-serving projections about its own product, a product which had just entered the market. He then used those hypothetical numbers to make predictions about a different untested product, ignoring many of the distinctions between RD162-prime and A52 that had already been established by the trial evidence.

Finally, Medivation contends that the trial court committed "legal error" by evaluating Leonard's opinions as if they pertained to an "unestablished business." However, the record clearly supports that approach. RD162-prime was a new drug and A52 had not even completed FDA testing. Even in cases in which lost future profits are available, courts distinguish established businesses from unestablished businesses. "[D]amages for prospective profits that might otherwise have been made from [the operation of an unestablished business] are not recoverable for the reason that their

occurrence is uncertain, contingent and speculative. [Citations.]’ ” (*Sargon, supra*, 55 Cal.4th at p. 774.)

4. Other Damages-Related Testimony

Medivation contends the trial court erroneously excluded other lay and expert testimony which allegedly would have supported Becker’s and Leonard’s conclusions. Medivation has forfeited this set of arguments by failing to raise a proper challenge to any specific evidence ruling, and by failing to support such a challenge with reasoned argument and citation to authority. (*Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1074.) Furthermore, Medivation’s general objections lack merit.

For example, Medivation contends that the trial court erred by excluding opinion testimony from some lay witnesses, arguing that a lay witness can testify about an opinion based on personal knowledge. (Citing *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 888-891.) By the same token, however, a lay witness may not properly testify about an “opinion that goes beyond the facts the witness personally observed.” (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1308.)

Medivation also contends that the trial court erred by limiting expert testimony to opinions previously disclosed in a deposition, arguing that the “permissible scope of expert testimony is based on an expert’s disclosures and declarations, not depositions.” (Citing Code Civ. Proc., § 2034.300.) However, Medivation mischaracterizes the court’s general ruling on this issue. As the court explained, “If somebody in the deposition has basically been asked, ‘Have you given us all the opinions you intend to offer,’ and they say ‘yes’ or something like that, and they haven’t given this opinion at the deposition, they’re not going to give it here.” As a general proposition, the trial court’s ruling is consistent with California law. “When an expert deponent testifies as to specific opinions and affirmatively states those are the only opinions he intends to offer at trial, it would be grossly unfair and prejudicial to permit the expert to offer additional opinions at trial.” (*Jones v. Moore* (2000) 80 Cal.App.4th 557, 565.) Medivation fails to identify any specific application of this ruling that was arguably unsound.

E. Medivation Was Not Entitled to Its Special Jury Instruction

Medivation contends the trial court erred by refusing to instruct the jury that it could not consider the profits that Medivation made by commercializing RD162-prime when deciding whether Medivation suffered cognizable damages.

1. Background

After receiving instructions on Medivation's two theories of fraud, the jury was instructed that if Medivation proved fraud, it would have to "decide how much money will reasonably compensate Medivation for the harm." To guide this inquiry, the court instructed that the damages award should include all harm that Jung was a substantial factor in causing, even if the harm was unforeseeable; that Medivation had to prove the "amount of its damages," but it did not have to prove an "exact amount"; and that the jury "must not speculate or guess in awarding damages."

Regarding the measure of fraud damages, the jury was instructed on the out-of-pocket rule with a version of CACI No. 1923, which stated that in order to "decide the amount of damages, you must determine the value of what Medivation gave and subtract from that amount the value of what it received," and that Medivation "may also recover amounts that it reasonably spent in reliance on Dr. Jung's intentional misrepresentation or false promise if those amounts would not otherwise have been spent."

However, the trial court did not give the jury an additional special instruction regarding the out-of-pocket rule that Medivation had proposed, which stated:

"During the trial, you heard evidence about the profits Medivation may make in the future from sales of Xtandi. You also heard evidence about Medivation's shareholder value. You should disregard that evidence in deciding Medivation's damages. [¶] In deciding the amount of Medivation's damages, if any, for intentional misrepresentation, concealment, or false promise, you may not consider Medivation's shareholder value. The shareholder value is the collective value of the shares in Medivation owned by its shareholders. Medivation's shareholders own those shares. The shares are not owned by Medivation. Because this lawsuit involves the company Medivation, and not its shareholders, Medivation's damages, if any, cannot be reduced based on its shareholder

value. [¶] You also may not reduce Medivation’s damages, if any, based on any profit Medivation may achieve in the future from Xtandi sales. As I previously explained, you may not speculate or guess when deciding Medivation’s damages, and future sales of Xtandi are speculative.”

2. Analysis

“A party is entitled to an instruction on each theory of the case that is supported by the pleadings and substantial evidence if the party requests a proper instruction. [Citations.] A court may refuse a proposed instruction that incorrectly states the law or is argumentative, misleading, or incomprehensible to the average juror, and ordinarily has no duty to modify a proposed instruction. [Citations.] A court may refuse a proposed instruction if other instructions given adequately cover the legal point. [Citation.] Moreover, the refusal of a proper instruction is prejudicial error only if ‘ ’it seems probable” ’ that the error “prejudicially affected the verdict.” [Citations.] [Citation.]” (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 684-685.)

Applying these rules here, we affirm the trial court’s ruling. To the extent Medivation’s special instruction added anything to the out-of-pocket damages instructions the court gave, it was either incorrect, argumentative or incomprehensible. The out-of-pocket rule requires the jury to consider the “value” of what the plaintiff gave, and to subtract from that amount, the “value” of what it received. (CACI No. 1923.) Thus, Medivation’s proposed instruction was incorrect to the extent it told the jury not to consider the value of RD162-prime, which was what Medivation received as a result of Jung’s alleged fraud.

On appeal, Medivation insists that shareholder value and profits from commercializing RD162-prime are not probative of what it received by relying on Jung’s alleged fraud. But this contention is an argument, not a rule of law. “The court should state rules of law in general terms, and avoid reciting matters of evidence. If the instruction embodies detailed recitals of fact drawn from the evidence, in such a manner as to constitute an argument to the jury in the guise of a statement of the law, it is improper. The matter may be entirely legitimate as argument by counsel, for when so

used, the jury knows that it comes from an interested source and may weigh and consider it accordingly. But it is seriously objectionable to have the same matter injected into the court's charge, which, as the jurors are informed, is binding upon them. [Citations.]' [Citation.]" (*Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077, 1108, overruled in part on another ground, *Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 639.)

Medivation contends that the trial court erred by failing to "prevent Jung from improperly urging the jury to consider Medivation's market capitalization or purported future Xtandi profits as offsets when deciding the amount of Medivation's fraud damages." To the extent Medivation is arguing that Jung's trial counsel made an objectively improper argument, Medivation's remedy was to object. However, in our review of the parties' closing arguments we found no such objection. If Medivation is complaining that Jung's defense was logically unsound, that was a subject properly addressed by counter-argument, not by a jury instruction. In fact, the record shows that both parties used their closing argument to debate the relevance of trial evidence which indicated that Medivation's license of RD162-prime was responsible for making Medivation a \$3 billion dollar company.

VI.

THE COURT TRIAL

A. Background and Issues Presented

The last set of issues raised in these consolidated appeals pertains to The Regents' cross-claim for declaratory relief regarding a collateral dispute between The Regents and Medivation about the ELA's definition of "Sublicensing Income."

As noted in our factual summary, the 2009 Astellas Agreement that Medivation executed in order to commercialize and market RD162-prime as a late-stage prostate cancer drug required Astellas to pay substantial "sales milestone payments" to Medivation. Before the Astellas Agreement was executed, Medivation obtained the 2009 Side Letter from The Regents, which purported to confirm the parties' agreement that Astellas's sales milestone payments to Medivation would not constitute Sublicensing Income under the ELA. However, by the time this litigation was filed, a dispute had

arisen between The Regents and Medivation regarding the validity of the 2009 Side Letter and whether sales milestone payments did in fact constitute Sublicensing Income under the ELA.

The stipulated court trial on The Regents' cross-claim for declaratory relief was held over three days in July 2013. On December 20, 2013, the trial court filed a 20-page Final Statement of Decision, in which it set forth extensive findings of fact and law supporting two ultimate conclusions: "(1) any sales milestone payments received by Medivation under the [Astellas Agreement] constitute Sublicensing Income within the meaning of the ELA; and (2) the [2009] Side Letter is of no legal effect."

On appeal, Medivation contends that both of the trial court's ultimate conclusions must be reversed because they are premised on an error of law and are not supported by the trial evidence. The findings of fact and law in the court's detailed Final Statement of Decision frame our discussion of Medivation's claims of error.

B. The Final Statement of Decision

1. *The ELA and Related Negotiations*

In 2005, Medivation and The Regents executed the ELA, pursuant to which Medivation secured a license to The Regents' patent rights in RD162-prime in exchange for various monetary payments. Among other things, the ELA provided that Medivation was to pay The Regents 10 percent of any "Sublicensing Income" it received after the first patient was dosed in a Phase III study.

Sublicensing Income is defined in Paragraph 1.10 of the ELA, which states: " '**Sublicensing Income**' means income received by Licensee under or on account of Sublicenses. Sublicensing Income includes income received including but not limited to license issues fees, milestone payments, and the like but specifically excludes royalties on the sale or distribution of Licensed Products or the practice of Licensed Methods." (Original boldface.)

In addition to sublicensing income payments, the ELA required Medivation to make royalty payments to The Regents. This separate contract requirement obligated Medivation to pay an earned royalty of 4 percent on net sales of Licensed Products

whether those products were sold by Medivation or by a sublicensee, and it also provided that any royalties that were paid to Medivation by a sublicensee in excess of the 4 percent owed to The Regents would belong to Medivation.

As reflected in the contract language quoted above, the ELA definition of Sublicense Income includes “milestone payments,” but milestone payments is not a defined contract term. At trial, the parties disagreed about whether sales milestone payments constitute milestone payments under the ELA or whether sales milestone payments are a type of royalty. To resolve this disagreement, the trial court considered extrinsic evidence, from which it made several pertinent findings.

Preliminarily, the court concluded that Patrick Machado, Medivation’s CBO and CFO, negotiated the ELA on behalf of Medivation. Machado is a trained lawyer and an experienced negotiator and businessman. Furthermore, the parties structured the ELA to require Medivation to pay The Regents several distinct streams of income so that The Regents could “share, at every stage, in the commercial success” of the licensed molecules, which included RD162-prime. One of those streams of income required Medivation to pay The Regents 10 percent of its sublicensing income.

“At all relevant times,” the court found, Medivation and The Regents understood that that the term “royalties” was used in the ELA to mean “monetary payments based on a percentage applied to each individual sale.” They also understood that the ELA imposed separate obligations on Medivation to pay The Regents 4 percent of earned royalties and an additional 10 percent of sublicensing income, and that these two types of payments represented separate streams of income owed to The Regents.

From the trial evidence, the court also concluded that the concept of a milestone payment has a commonly understood meaning in the pertinent industry as referring to “event-driven or success payments, which are distinct from royalty payments.” It is also commonly understood that the term “milestone payments” includes not just regulatory milestones but also sales milestones which are “lump-sums paid when aggregate sales reach certain levels.” The court found that when the parties executed the ELA, they

understood and intended that contract language referring to “milestone payments” would have this commonly understood meaning.

2. Medivation’s Negotiations with Astellas

In 2009, Medivation executed the Astellas Agreement “to develop, market and sell” RD162-prime, “a cancer drug currently sold under the brand name Xtandi.” The trial court made the following pertinent findings about the negotiations that resulted in the Astellas Agreement:

In February 2009, Medivation hired a financial advisor named John Dyer to locate a partner to help Medivation develop and sell RD162-prime as a commercial drug. Machado told Dyer that the ELA required Medivation to pay The Regents a percentage of all upfront and milestone payments that it received from any partnership. A few months later, Dyer identified Astellas as a potential partner.

In June 2009, Medivation sent Astellas a term sheet which outlined the “types of consideration it sought from Astellas in exchange for a sublicense” of RD162-prime, and invited Astellas to propose amounts it was willing to pay. The term sheet identified five separate categories of payments that Medivation expected to receive: “(1) an up-front sublicensing fee; (2) development milestones payments; (3) sales milestones payments based on global sales; (4) profit-sharing payments based on U.S. sales; and (5) royalty payments based on sales outside the U.S.”

Medivation identified sales milestones as a separate category of payment it wanted to receive “because it wanted to be able to disclose a large financial number to the public, knowing that a big pharmaceutical company like Astellas would likely not allow the public disclosure of royalty rates but would be more receptive to allowing a public disclosure of sales milestone payments.”

In response to Medivation’s term sheet, Astellas submitted an initial offer to pay Medivation \$445 million in “biobucks,” which included the up-front fee, and regulatory and sales milestone payments, and also to pay royalties and profit sharing. Astellas agreed that the biobucks could be disclosed to the public, but that royalty rates were trade secrets that could not be disclosed to the public. During the negotiations that followed,

the parties resolved various points of contention including whether sales milestones should be limited to U.S. sales, and what the royalty rates should be.

On October 9, 2009, Medivation and Astellas reached agreement regarding the financial terms of their partnership, subject to final approval by each party. In this regard, the court found that “Medivation had successfully negotiated \$765 million in ‘biobucks’ consisting of: (1) an upfront-licensing fee of \$110 million; (2) development milestone payments of \$335 million; and (3) sales milestone payments of \$320 million based on global sales.” In addition, Astellas agreed to pay royalties on sales outside the U.S. and to make profit-sharing payments to Medivation on U.S. sales.

Both companies scheduled board meetings for late October 2009 to vote on the agreement. In the meantime, Astellas informed Medivation that it would not execute a final agreement unless Medivation first obtained an amendment to the ELA which clarified Medivation’s right to the RD162-prime molecule.

3. The 2009 Side Letter

After the Astellas Agreement was fully negotiated but before it was executed, Medivation “procured” the 2009 Side Letter from The Regents. The trial court heard conflicting testimony and evidence about the events culminating in the 2009 Side Letter, from which it made the following pertinent findings:

On October 14, 2009, Machado called The Regents’ employee, Dr. Claire Wake, about two matters. First, he asked for the ELA amendment that Astellas had requested. Then, he asked for a side letter regarding the sales milestone payments that would be made under the Astellas Agreement. Wake told Machado she did not have authority to provide a side letter and referred him to her supervisor, Emily Loughran.

On October 15, 2009, Machado had a telephone conversation with Wake and Loughran during which he made the following representations: “(a) the purpose of the Side Letter was to allow Medivation and Astellas to boast about the financial terms of their deal in an upcoming press release; (b) Astellas wanted the press release to reflect a large dollar value, but did not want it to disclose the royalty rates because Astellas considered those rates to be trade secrets; (c) to accomplish those goals, Medivation and

Astellas would structure their deal in a way that moved royalties in excess of the four percent owed to The Regents into the sales milestone category; (d) Medivation and Astellas would be moving money to which The Regents had no claim under the ELA from one area to another in order to make the deal look bigger to the public; (e) the side letter would have no economic impact on The Regents' financials under the ELA; (f) the side letter was needed to close the deal between Medivation and Astellas; and (g) the sales milestone payments in the [Astellas Agreement] would be royalty payments that would be paid at a later date.”

During Machado's conversations with Wake and Loughran, there was no discussion about the following subjects: (1) whether The Regents would receive any benefit or give anything up by signing the side letter that Machado requested; (2) whether there was any ambiguity about the definition of Sublicensing Income in the ELA; (3) whether there was any “economic equivalence or similarities between sales milestones payments and royalty payments under the ELA”; or (4) whether Medivation would renegotiate the terms of the Astellas Agreement if The Regents refused to confirm that sales milestone payments were not sublicensing income under the ELA.

Under the circumstances established by the trial evidence, the court found that Loughran reasonably understood that the Astellas Agreement would use the term “sales milestones” to refer to what were actually “deferred royalties,” and that “deferred royalties” meant royalties above the 4 percent royalty payments owed to The Regents, which would be paid to Medivation at a later date than they were earned. Loughran also reasonably relied on Machado's representations when she signed the 2009 Side Letter because, as a general matter, The Regents treat negotiations between a licensee and sublicensee as confidential, and because the ELA did not require Medivation to provide The Regents with a copy of a sublicensing agreement until after that agreement was fully executed.

4. The Astellas Agreement

The final version of the Astellas Agreement incorporated the exact financial terms set forth in the October 9 draft agreement, which imposed separate financial obligations

on Astellas to pay fees, sales milestone payments and royalties. Under that agreement, each sales milestone is triggered when global aggregate annual sales reach a specified level, and each is owed only once. The maximum sales milestone payments Medivation can receive total \$320 million. By contrast, royalty payment obligations are triggered by individual sales, are based on sales outside the U.S., and are recurring.

The trial court found that the parties did not structure the Astellas Agreement so that deferred royalties were described as sales milestones, nor did they have any discussion about doing that.

The trial court also found that Medivation understood, throughout negotiations with Astellas, that sales milestones were separate and distinct from royalties. Astellas did not request or know about the 2009 Side Letter that Medivation secured from The Regents, nor did it need such a letter to close the deal with Medivation. Before the Astellas Agreement was executed, Machado did not tell Dyer, Medivation's executive board, or anyone at Astellas that he had secured the 2009 Side Letter from The Regents. Nor did he discuss with any of them the issues addressed in that letter, the idea that the ELA's definition of Sublicensing Income was ambiguous, or the idea that sales milestone payments and royalties are financially equivalent.

The court also concluded that Machado's representations to The Regents about the 2009 Side Letter were false and he knew they were false when he made them. Those false representations included that (1) the purpose of the 2009 Side Letter was to allow a press release disclosure of Astellas' large investment; (2) the side letter would not change the amount of money Medivation would owe The Regents; (3) the side letter was necessary to close a deal with Astellas; and (4) sales milestones under the Astellas Agreement were actually deferred royalties. Machado made these false representations to Wake and Loughran in order to induce The Regents to sign the 2009 Side Letter, "thereby seeking to cause The Regents to forego its right to receive potentially \$32 million from Medivation."

Finally, the trial court explicitly rejected Machado's testimony that Medivation would have renegotiated the terms of the Astellas Agreement to eliminate sales

milestones and replace them with increased royalties if The Regents had refused to sign the 2009 Side Letter. The court found that Machado's testimony to that effect was not credible. The trial evidence showed that the financial terms of Medivation's partnership with Astellas were agreed to before Machado approached The Regents about a side letter. Further, the high sales milestones payments that Medivation negotiated in early October 2009 accomplished its goal of securing a deal that was "frontloaded with money" that could be disclosed in a press release.

C. The Definition of Sublicensing Income

In its Final Statement of Decision, the trial court held that "the definition of Sublicensing Income unambiguously includes sales milestone payments. The ELA's clear and explicit language and the mutual understanding of the parties at the time of contracting fortifies that conclusion." Medivation challenges this ruling as an error of law, seeking independent review without any "deference to how [matters were] answered below." (Quoting *Brewer v. Murphy* (2008) 161 Cal.App.4th 928, 936.)

Preliminarily, we clarify our proper standard of review. "The trial court's determination of whether an ambiguity exists is a question of law, subject to independent review on appeal. [Citation.] The trial court's resolution of an ambiguity is also a question of law if no parol evidence is admitted or if the parol evidence is not in conflict. However, where the parol evidence is in conflict, the trial court's resolution of that conflict is a question of fact and must be upheld if supported by substantial evidence. [Citation.]" (*Wolf, supra*, 114 Cal.App.4th at p. 1351.)

At the court trial, the court was once again called upon to interpret a provision in the ELA. This time, however, the court admitted conflicting extrinsic evidence regarding the ELA's definition of sublicensing income. Thus, we agree with Medivation that this court should independently review the pertinent contract language. However, the trial court's factual findings about the extrinsic evidence are reviewed for substantial evidence. (*Wolf, supra*, 114 Cal.App.4th at p. 1351.)

1. The Contract Language

As noted above, the ELA's definition of Sublicensing Income expressly includes "milestone payments." Furthermore, the inclusion of the phrase "and the like" signifies an intent to broaden rather than restrict the scope of the concept. We also observe that the ELA does not contain a definition of milestone payments, or any other provision which distinguishes between different types of milestone payments. Under these circumstances, the contract language itself strongly indicates that the contracting parties manifested their mutual intention for Sublicensing Income to include sales milestone payments.

Medivation nevertheless contends that the ELA "bears several indicia signifying that sales milestone payments are royalties, not Sublicensing Income." The two examples it provides are not persuasive. First, Medivation relies on Paragraph 4.3, which is in a section of the ELA that describes fees Medivation must pay to The Regents. Paragraph 4.3 states that "[f]or each Licensed Product reaching the milestones indicated below, [Medivation] must make the following payments to The Regents within 30 days of reaching the milestones." Medivation argues that because all the milestones set forth in Paragraph 4.3 are developmental milestones, the reference to milestones in the definition of Sublicensing Income should also be limited to developmental milestones.

Paragraph 4.3 deals with Medivation's obligation to make milestone payments directly to The Regents, rather than Medivation's independent obligation to pay The Regents a percentage of its Sublicensing Income. Furthermore, even if it was tangentially relevant, Paragraph 4.3 might support the argument that the contract term "milestones" includes developmental milestones, but not that it is limited to that specific type of milestone payment. Thus, we reject Medivation's theory that Paragraph 4.3 narrows the scope of the term "milestone payments" used in the separate and unrelated provision of the ELA defining Sublicensing Income.

Second, Medivation relies on Paragraph 5.2 of the ELA, which requires Medivation to pay The Regents a minimum annual royalty of \$100,000, beginning in the year that a licensed product is first sold. Medivation argues Paragraph 5.2 is significant

because it uses the word “royalty” to characterize a lump sum conditional payment that is not tied to individual product sales. By a parity of reasoning, Medivation urges that sales milestones payments fall within the definition of royalties which are specifically excluded from the ELA definition of Sublicensing Income. However, Medivation overlooks that Paragraph 5.2’s minimum annual royalty payment is explicitly characterized and structured as an advance payment of the actual earned royalty payments Medivation must pay The Regents under Paragraph 5.1, and there is no dispute that the actual earned royalty payments are tied to individual product sales.

2. The Extrinsic Evidence

Medivation contends that the trial court’s interpretation of the ELA definition of Sublicensing Income is inconsistent with trial evidence which purportedly establishes that (1) the industry practice is to treat sales milestone payments as royalties; (2) The Regents acknowledged that sales milestone payments can be structured as royalties; and (3) the Astellas Agreement characterizes sales milestones as royalty payments.

Medivation has waived arguments about the extrinsic evidence by failing to fairly summarize or even to acknowledge most of that pertinent evidence in its appellate briefs. (See, e.g., *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1530-1532 (*Davenport*)). The *Davenport* court admonished appellant for her recitation of the evidence in a fashion favorable to her, “as though [the trial court’s] comprehensive, fact-based statement of decision did not exist.” (*Id.* at pp. 1530-1531.) As the court warned, “ ‘Misstatements, misrepresentations and/or material omissions of the relevant facts or law can instantly “undo” an otherwise effective brief, waiving issues and arguments; it will certainly cast doubt on your credibility, may draw sanctions [citation], and may well cause you to lose the case!’ [Citation]” (*Id.* at p. 1532.) Here, as in *Davenport*, Medivation acts as though there was no statement of decision setting forth the trial court’s findings of fact.

Even if Medivation’s claims are not waived, they are unavailing. For example, Medivation posits that “[t]reating sales milestones as royalties accords with common practice in the pharmaceutical and university contexts,” citing the testimony of its own

trial expert, John Ritter. However, the trial court rejected Ritter's opinion by finding that (1) it is commonly understood in the industry that milestone payments connote "event-driven or success payments, which are distinct from royalty payments"; (2) it is also commonly understood that milestone payments include payments "made upon the occurrence of both regulatory milestones and sales milestones"; and (3) the parties understood that these terms had these commonly understood meanings when they negotiated the ELA.

These factual findings are supported by the testimony of Emily Loughran and Patrick Machado. As noted, Loughran is the director of licensing at UCLA. Machado is Medivation's CBO and CFO, a lawyer with a background in contract law, and the person who negotiated the ELA for Medivation. Thus, both witnesses were competent to testify about industry standards as well as the intentions of the parties.

In a separate argument, Medivation contends that the trial court made a finding that a sales milestone payment cannot constitute a royalty as a matter of law, and that this finding constitutes reversible error. According to Medivation, the very existence of the 2009 Side Letter proves that an agreement can be structured so that sales milestones are deferred royalties. Furthermore, Medivation construes Loughran's testimony that she signed the side letter because she reasonably believed Machado's representations about the structure of the Astellas Agreement as an admission by The Regents that such a structure is possible. Characterizing this evidence as proof that a sales milestone payment can be a royalty, Medivation contends the trial court committed a legal error by concluding that "sales milestone payments unambiguously were not royalties."

However, the issue before the trial court was not whether a sales milestone can ever be properly characterized as a deferred royalty, but rather whether Medivation and The Regents intended for sales milestone payments to constitute Sublicensing Income under the ELA when they defined that term to include "milestones, and the like." After considering all of the extrinsic evidence, the court made an ultimate ruling that, in this specific case, the definition of sublicensing income in the ELA includes sales milestones.

We affirm this ruling, which is consistent with the relevant contract language and supported by substantial evidence summarized in the Final Statement of Decision.

D. The 2009 Side Letter

The trial court found that the 2009 Side Letter was unenforceable because it was procured by fraud; was signed under a unilateral mistake of fact; and was not supported by consideration. Medivation challenges each of these findings, but we will limit our discussion to the finding of fraud, which is a sufficient basis upon which to affirm the court's ruling.

Preliminarily we reject Medivation's contention that the court's finding of fraud rests on the "faulty view that sales milestone payments cannot be royalties." Medivation repeatedly returns to this theme, characterizing it as a "threshold error" of law that "compromised" the court's entire analysis. However, as explained above, the trial court did not make a finding of law that a sales milestone can never be a royalty, but instead concluded that a sales milestone payment does not constitute a royalty excluded from the definition of Sublicensing Income under the ELA. By the same token, in the second part of its Final Statement of Decision, the trial court did not find that a royalty can never be deferred and restructured as a sales milestone payment. Rather, it made a factual determination that the Astellas Agreement was not structured so that sales milestone payments were actually deferred royalty payments.

Medivation next contends that The Regents failed to carry their heavy burden of proving fraud. However, this analytical approach is also flawed. "On appeal, a judgment of the trial court is presumed to be correct. [Citation.]" (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.) Thus, it is Medivation who has the burden of proving error by establishing that the court's factual findings are not supported by substantial evidence. (*Westfour Corp. v. California First Bank* (1992) 3 Cal.App.4th 1554, 1558.)

"The elements of fraud or deceit (see Civ. Code, §§ 1709, 1710) are: a representation, usually of fact, which is false, knowledge of its falsity, intent to defraud,

justifiable reliance upon the misrepresentation, and damage resulting from that justifiable reliance. [Citations.]” (*Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 72-73.)

Here, the trial court found that “Medivation consciously misrepresented multiple material facts to induce The Regents to sign the Side Letter, among which were: (1) that the sales milestone payments in the [Astellas Agreement] would be structured as deferred royalties; (2) that the Side Letter would have no financial impact on The Regents; (3) that the Side Letter was needed to close the deal with Astellas; and (4) that the Side Letter was solely for ‘optics’ in a press release.” The court also found that under the circumstances established by the evidence, “The Regents reasonably relied on Medivation’s material misrepresentations and would not have signed the Side Letter but for those misrepresentations.”

Medivation contends that it could not have knowingly mischaracterized sales milestones as “deferred royalt[ies],” because Loughran admitted at trial that the term “deferred royalty” was her word choice. But the court’s substantive finding that Machado made false representations about the structure of Medivation’s financial agreement with Astellas does not depend on the specific word choice that Machado used to describe the payments that would be made under the Astellas Agreement.

The trial court found that Machado knowingly and falsely told Loughran and Wake that Medivation and Astellas were going to structure their “deal in a way that moved royalties in excess of the four percent owed to The Regents into the sales milestone category”; and that “Medivation and Astellas would be moving money to which The Regents had no claim under the ELA from one area to another in order to make the deal look bigger to the public.” Medivation does not dispute that substantial evidence supports these findings.

Furthermore, in making these findings the court not only credited the testimony of The Regents’ witnesses, it expressly discredited any contrary testimony Machado gave about the pertinent conversations. “As the trier of fact in this case, the trial judge was the exclusive judge of the credibility of the evidence. [Citation.] In that role, the judge may

reject any evidence as unworthy of credence, even uncontradicted testimony. [Citation.]” (*In re Marriage of Falcone & Fyke* (2012) 203 Cal.App.4th 964, 979.)

Medivation next contends the trial evidence did not establish that Medivation “misrepresented . . . that the Side Letter would have no financial impact on The Regents.” Medivation reasons that, “if Medivation reasonably believed sales milestone payments to be royalties, then Medivation’s representation could not be knowingly false.” Tellingly, Medivation cites no evidence establishing that it held such a reasonable belief, nor does it properly challenge the trial court’s findings that it did not.

Medivation also challenges the court’s findings that it made false representations by telling The Regents that (1) it needed the 2009 Side Letter to close the deal with Astellas, and (2) it wanted the letter solely for optics in a press release. Characterizing these statements as true, Medivation relies on evidence which showed that publicizing high lump-sum payments was important to Medivation. However, Medivation fails to demonstrate how this evidence is inconsistent with the trial court’s findings that the side letter was not a necessary condition for closing the deal with Astellas, and that the true purpose of the side letter was to cause The Regents to forego its contractual right to a percentage of the sales milestones payments.

Moving to a different element of fraud, Medivation contends that The Regents could not have reasonably relied on Medivation’s false representations. Medivation reasons that, if royalties cannot ever be categorized as sales milestones in a licensing agreement, then The Regents could not have reasonably relied on Machado’s representations that the Astellas Agreement was structured so that deferred royalties were identified as sales milestones. The trial court did not find that royalties cannot ever be categorized as sales milestones, but rather that the sales milestone payments in the Astellas Agreement were not royalties. Furthermore, the court found that The Regents’ reliance on Machado’s representations was reasonable because it did not have access to the Astellas Agreement until after it was executed, and because it was not privy to the negotiations between Medivation and Astellas. Medivation fails to address these pertinent findings which are supported by substantial evidence.

Finally, Medivation contends that Machado's misrepresentations did not cause The Regents harm. At trial, Medivation conceded that "the amount of money potentially at stake in the instant dispute is \$32 million," and that a "decision in favor of The Regents will require Medivation to pay that potential amount to The Regents." On appeal, Medivation argues that foregoing \$32 million by signing the 2009 Side Letter did not constitute harm because if The Regents had refused to sign that letter, Medivation would not have entered into the Astellas Agreement, and the benefits that The Regents have reaped from the Astellas Agreement far outweigh any harm caused by signing the 2009 Side Letter. This argument is based on the testimony of Patrick Machado, which the trial court rejected as speculative and not credible.

VII.

DISPOSITION

The judgments and postjudgment orders are affirmed. Respondents are awarded costs on appeal.

RUVOLO, P. J.

We concur:

REARDON, J.

RIVERA, J.

A138405, A139096, A141193, A142480, *Medivation, Inc. v. UC Regents*